

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1916.

No. 3019

377

No. 13, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA *EX RELATIONE*
SOUTHERN PACIFIC RAILROAD COMPANY, A COR-
PORATION, APPELLANT,

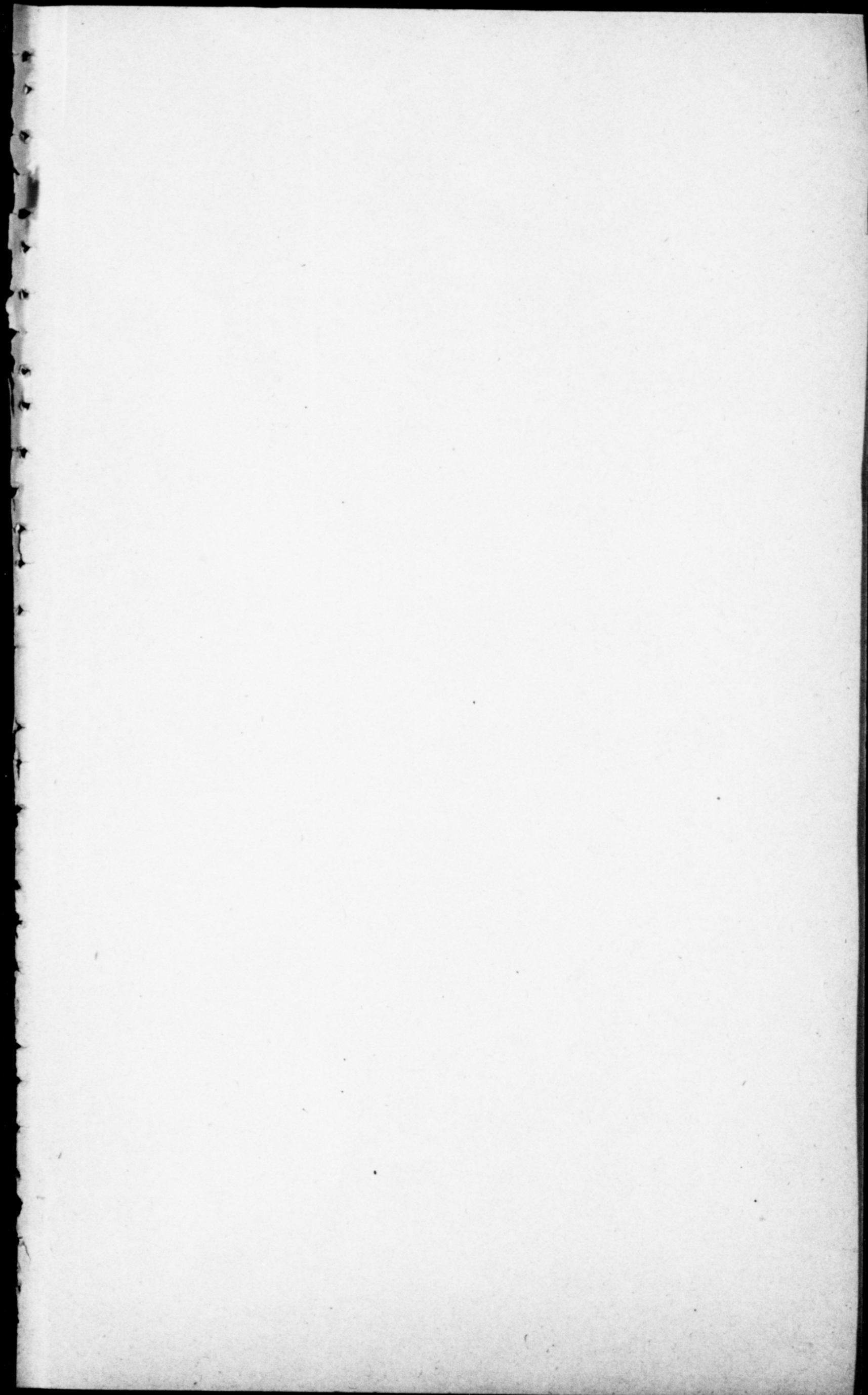
vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND
CLAY TALLMAN, COMMISSIONER OF THE GENERAL
LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED SEPTEMBER 1, 1916.

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Court of Appeals of the District of Columbia.

OCTOBER TERM, 1916.

No. 3010.

No. 13, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA *EX RELATIONE*
SOUTHERN PACIFIC RAILROAD COMPANY, A COR-
PORATION, APPELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND
CLAY TALLMAN, COMMISSIONER OF THE GENERAL
LAND OFFICE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

No. 3010.

THE UNITED STATES OF AMERICA ex Relatione SOUTHERN PACIFIC
RAILROAD Co., &c., Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, et al.

a Supreme Court of the District of Columbia.

At Law. No. 58737.

THE UNITED STATES OF AMERICA ex Relatione SOUTHERN PACIFIC
RAILROAD COMPANY, a Corporation, Petitioner,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN,
Commissioner of the General Land Office, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had in the above-entitled cause, to wit:

1 *Petition for Mandamus.*

Filed January 10, 1916.

In the Supreme Court of the District of Columbia.

Law. No. 58737.

THE UNITED STATES OF AMERICA ex Relatione SOUTHERN PACIFIC
RAILROAD COMPANY, a Corporation, Petitioner,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN,
Commissioner of the General Land Office, Respondents.

The petition of The United States of America, on the relation
of the Southern Pacific Railroad Company, a corporation, respect-
fully represents:

1—3010a

1. That said Southern Pacific Railroad Company is a body corporate, duly created, organized and existing under and in accordance with the laws of the State of California; and brings this its petition for mandamus against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia, in respect of the matters and things hereinafter set forth; and Clay Tallman, a citizen of the State of Nevada, residing in the District of Columbia.

2. That, at the several times hereinafter referred to, said respondents were, and they still are, respectively, Secretary of the Department of the Interior of the United States, and Commissioner of the United States General Land Office; and, as such officers, had and have, under the general supervision of the said Secretary of the Interior, charge of the administration of the laws of the United States relating to public lands, and the administration of all land grants made by Congress, including any portion of said public lands, and that said respondents are sued in their official capacity, aforesaid, as hereinafter set forth.

3. That, by an Act of the Congress of the United States, approved July 27, 1866, (14 Stat., 292), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," authority was given the Southern Pacific Railroad Company of California to construct a railroad and telegraph line, upon and under the certain conditions and stipulations expressed in said act, to connect with the Atlantic and Pacific Railroad Company at such point near the boundary line of the State of California as the companies named should deem most suitable for a railroad line to San Francisco; and said act contained a grant of lands to certain railroad corporations therein named, including specifically said Southern Pacific Railroad Company of California; said grant being thus:

"Sec. 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by

odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers:
* * * Provided further, That all mineral lands be, and the same hereby —, excluded from the operations of this act and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road and within twenty miles thereof, may be selected as above provided: And provided further, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: * * *

By section four of said act, it was thus provided:

"And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workman-like manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed, as aforesaid."

By section six of said act, it was thus provided:

"And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed excepting those hereby granted to said company."

By section eight of said act, it was thus provided:

"And be it further enacted, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval

of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini, eighteen hundred and seventy-eight."

By section eleven of said act, it was thus provided:

"And be it further enacted, That said Atlantic and Pacific railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

By section twelve of said act, it was thus provided:

"And be it further enacted, That the acceptance of the terms, conditions and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

By section eighteen of said act, it was thus provided:

"And be it further enacted, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for."

4. That said Southern Pacific Railroad Company duly accepted the grant so made to it in said act, and duly filed in the Office of the Secretary of the Interior its written assent in that behalf; and, thereafter, there was duly passed by the Senate and House of Representatives of the United States in Congress assembled a certain joint resolution approved June 28, 1870, (16 Stat. 382), as follows:

"That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said rail-

road and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions, provided for in the third section of said act."

5. That said Southern Pacific Railroad Company duly constructed, completed and equipped a line of railroad in the manner and within the time prescribed by the certain granting act and joint resolution of Congress aforesaid; and the same was duly accepted by the President of the United States, after sworn report by commissioners, as required by the certain granting act and joint resolution aforesaid; and each, every and all of the conditions, stipulations and requirements of said land grant were and have been fully met, performed, and satisfied.

6. That the Southern Pacific Railroad Company, relator herein, is the successor (by consolidation) of said Southern Pacific Railroad Company hereinabove named; and, by reason thereof, has become the legal successor in interest of all and singular the rights, titles, properties and franchises of the corporation last named, including the certain land grant so made to the Southern Pacific Railroad Company, hereinabove mentioned.

7. That, by the provisions of a certain other act of Congress, approved March 3, 1887, (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroad and heretofore unadjusted"; and although the fact is that the certain railroad hereinabove mentioned, provided for in said granting act and joint resolution aforesaid, has been fully constructed, completed, equipped, and operated for a great many years, with all of the incidental benefits to the United States as fixed and provided by said granting act, the land grant itself remains unadjusted.

8. That the granting act, of July 26, 1866, supra, and said joint resolution, of June 28, 1870, supra, constituted a contract between the United States and said first-named Southern Pacific Railroad Company to the rights of which company the relator herein has succeeded, as aforesaid; and that the indemnity grant therein contained was and is as much a part of said statutory contract as the grant of primary or place lands therein and thereby made; and that the certain grant aforesaid conferred, and was intended to confer, upon the railroad grantee the same complete and absolute title to lands embraced within the indemnity provisions of the grant as those granted within the primary or place limits, without restriction, burden or easement of any kind, character or description whatsoever; and, accordingly, that where lands within the indemnity limits of said grant were free from entry, adverse claim, or withdrawal at the time of the indemnity selection thereof by the railroad grantee, and were not known to contain mineral of value,

the said grantee became entitled to patent covering the lands so selected, "confirming to said company the right and title to said lands," and conveying the complete and absolute title thereto, without restriction, limitation or qualification of any kind or character whatsoever.

9. That the relator herein heretofore filed in the United States local land offices at Independence and Los Angeles, California, respectively, certain lists of selections of indemnity lands, embracing, inter alia, the lands hereinafter mentioned, assigning good, sufficient and valid base therefor of tracts in equal area lost to said relator within the primary or place limits of the grant aforesaid, the same being duly specified and set forth in said several lists of selections; and which said selection lists were accompanied by the fees collectible by law; and that said relator otherwise met, in every requirement, the rules and regulations of the Department of the Interior in respect of making and filing railroad indemnity selection lists; and said several selections were, thereafter, duly certified by the
8 register and receiver of said local land offices, respectively, and transmitted to the General Land Office of the Department of the Interior for further action thereon.

10. That certain of the lands embraced within the certain indemnity selections aforesaid, aggregating 9,608.56 acres, were, thereafter, duly clear-listed and approved by the Department of the Interior for patent to said relator, the same having been found to be lands to which it was properly entitled under the certain land grant aforesaid; and, thereupon, a certain patent was issued therefor, the same being numbered 161, and dated February 10, 1915, and containing lands aggregating 9,608.56 acres, as above.

A true and correct copy of said patent is hereto attached, marked "Exhibit A," and asked to be taken and considered as a part hereof.

11. That, as will appear from the certain patent aforesaid, there was contained therein the following reservation:

"And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States."

12. That, thereafter, the relator herein endeavored, but without avail, to secure the re-issuance of patent for the certain lands from which should be eliminated the certain reservation hereinabove quoted; and, to that end, offering and tendering the surrender of the certain patent No. 161 as so originally issued, as above, and the re-issue thereof to relator in proper form, and without limitation, qualification, restriction, or reservation, as above; and, in that behalf, said relator caused formal communication to be sent to the respondent, dated July 16, 1915; a true and correct copy whereof
9 is hereto attached, marked "Exhibit B," and asked to be taken and considered as a part hereof.

13. That the certain request last herein aforesaid was denied and refused by respondents; as will appear from letter in that behalf, dated November 3rd, 1915; a true and correct copy whereof is hereto attached, marked "Exhibit C," and asked to be taken and considered as a part hereof.

14. That the title to each and all of the tracts embraced within the certain patent aforesaid remains as it was at the date of the issuance of the certain patent aforesaid, and that the latter has not been placed of record in any of the land districts or counties wherein said lands are situated; that no change in the title to said tracts has occurred since the issuance of said patent; and that there is nothing outstanding which would or could in any way interfere with the surrender of said patent to respondents and the re-issue thereof in proper form, as herein aforesaid.

15. That the respondents had no lawful authority to insert in the patent aforesaid any other terms than those of conveyance of complete and absolute title, with recital showing a compliance with the law under which the grant of said lands was made and the conditions which it prescribed; and that there was and is no authority of law to restrict, qualify or burden said title by the reservation of an easement across said lands in favor of the United States, or otherwise however.

16. That, notwithstanding the plain and unambiguous terms of the granting act aforesaid, whereby complete and absolute title was granted as to lands within both place and indemnity limits, and notwithstanding the express mandate therein contained that
10 patents of lands shall issue, "confirming to said company the right and title to said lands situated opposite to and coterminous with" completed sections of said road; as well the further express mandate contained in said joint resolution, of June 28, 1870, supra, that "it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on * * * to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six"; as well, also, the fact that, by full construction of the railroad provided for by the granting act and joint resolution aforesaid, and otherwise fully complying with the terms, conditions, requirements, and exactions thereof, the full, complete and absolute right and title to the certain lands aforesaid has been fully earned; as well, also, the further fact that the United States has received valuable consideration therefor; nevertheless, the respondents herein have hitherto refused, and still do refuse, to issue to the relator herein any patent, and including specifically the certain patent No. 161, supra, for lands within the indemnity grant aforesaid that does not contain a reservation of easement for ditches or canals constructed by the authority of the United States.

17. That, unless such unauthorized action on the part of respondents be corrected by the mandate of this Court, the titles of relator to lands falling within the limits of its indemnity grant, as aforesaid, as evidenced by patent or patents issued therefor, including the certain patent No. 161, supra, will be, and ever thereafter remain, subject to the apparent cloud created and effected by the inser-
11 tion therein of said unauthorized reservation of easement; thereby seriously impairing the value to relator of the land grant so conferred and intended to be conferred by the certain land

grant aforesaid; as well, also, seriously affecting and impairing the saleability of such lands burdened with an apparent perpetual easement, as aforesaid.

18. That if the certain unauthorized reservation of apparent easement in favor of the United States be permitted to be imposed upon the title of said relator to the certain indemnity lands aforesaid, it will operate to deprive said relator of the absolute and full enjoyment of the title to said lands so heretofore granted by Congress, as aforesaid, and for which the United States has received valuable consideration; will be in violation of the statutory contract accomplished and effected by the granting act of July 27, 1866, and by the joint resolution of June 28, 1870, aforesaid; will limit, and to the extent of the tracts described, and any and all others similarly situated, will defeat to the extent aforesaid the will of Congress as expressed in said grant, and this too after the said grantee has performed in full the several conditions in consideration whereof the grant was made; and will further result in the unlawful taking of the private property of the relator for public use without its consent and without compensation, all to its irreparable loss, damage and injury; and that relator is without adequate remedy at law, or otherwise however, save only as prayed herein.

Wherefore, the premises considered, your petitioner prays:

12 1. That a writ of mandamus may be issued and directed to the respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, commanding them to deliver, or cause to be delivered, to your petitioner, upon the surrender of the certain Patent No. 161, described in paragraph ten of this petition, a patent to the lands described therein; and which patent shall be one of conveyance of the complete and absolute title to said lands, and omitting therefrom the certain reservation in the foregoing petition mentioned, or any reservation whatever in any way restricting, qualifying or limiting the complete and absolute title to said lands as conferred and intended to be conferred by the certain land grant aforesaid.

2. For such other and further right or rights, relief or order as to the Court may seem proper and the nature of petitioner's case may require.

To which end, petitioner prays that a rule may issue requiring the respondents herein, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to show cause, if any they have, why the writ of mandamus should not issue herein as prayed.

[SEAL.]

SOUTHERN PACIFIC RAIL-
ROAD COMPANY,
By W. R. SCOTT,
Second Vice-President.

Attest:

G. L. KING,
Secretary.

A. A. HOEHLING, JR.,
Attorney for Petitioner.

G. L. K.

13 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Before me, E. B. Ryan, a Notary Public in and for the State, City and County aforesaid, personally appeared W. R. Scott, who, being by me first duly sworn, on oath, says, that he is the Second Vice President of the Southern Pacific Railroad Company, the re-lator corporation named in the foregoing petition; that he has read the foregoing petition by him subscribed as such Vice President and knows the contents thereof; that the statements of fact therein made as upon personal knowledge are true, and those made upon information and belief, he believes to be true.

W. R. SCOTT.

Subscribed and sworn to before me this 31st day of December,
A. D. 1915.

[SEAL.]

E. B. RYAN,
Notary Public.

"EXHIBIT A."

Patent No. 161.

Southern Pacific Railroad Company.

Main Line Indemnity.

Independence and Los Angeles Land Districts, California.

The United States of America to all to whom these presents shall come, Greeting:

14 Whereas, by the Act of Congress approved July 27, 1866 and the Joint Resolution of June 28, 1870, "to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast," and to secure to the Government the use of the same for Postal, Military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of said State, to construct a Railroad and Telegraph line, under certain conditions and stipulations expressed in said Act, from the City of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said State and provision is made for granting to the said Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved, granted or otherwise appropriated by the United States, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed; and

Whereas, it is further provided in said Act "That the word

'mineral' when it occurs in this act shall not be held to include iron or coal"; and

Whereas, it is further provided by said Act that "whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preempted or otherwise disposed of, other lands shall be selected by said Company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate
15 sections and not included in the reserved numbers"; and

Whereas, it has been shown by evidence filed in the Department of the Interior that the entire line of the Southern Pacific (main line) Railroad and Telegraph from San Jose to The Needles on the Colorado River, except that portion between Tres Pinos and Alcalde, which was declared forfeited by the Act of September 29, 1890, has been constructed and fully completed and equipped in the manner prescribed by said Act of July 27, 1866, and accepted; and

Whereas, it is shown by certain papers filed in the office of the Commissioner of the General Land Office by the duly authorized Attorney of the Southern Pacific Railroad Company, with his letter of April 30, 1902, that said Southern Pacific Railroad Company is the successor by consolidation of the Southern Pacific Railroad Company of California; and

Whereas, the following tracts have been selected under the Acts aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company of California, or its successor, as shown by his original list approved by the local officers, and now on file in the General Land Office; and

Whereas, the said tracts of land lie coterminous to the constructed line of said road and within thirty miles thereof, and are particularly described as follows, to-wit:

California.

Mount Diablo Meridian.

Township thirty-one south of Range thirty-eight east.

The north half of Section five, containing three hundred
16 twenty-eight and thirty-eight-hundredths acres;

San Bernardino Meridian.

Township five north of Range nine west.

The northwest quarter of the northwest quarter, the south half of the northwest quarter, the northeast quarter and the south half of Section one, containing six hundred thirty-four acres; the northeast quarter, the north half of the northwest quarter and the southeast quarter of the northwest quarter of Section three, containing three hundred thirty-one and thirty-six hundredths acres; the south half of the north half of Section five, containing one hundred sixty acres;

Section seven, containing six hundred eighteen and sixty-two-hundredths acres; Section thirteen, containing six hundred forty acres; and Section fifteen, containing six hundred forty acres;

Township six north of Range ten west.

The north half of Section twenty-one, containing three hundred twenty acres; and Section twenty-seven, containing six hundred forty acres;

Township six north of Range eleven west.

Section five, containing six hundred forty-one and eighty-two hundredths acres; Section seven, containing six hundred forty-four and thirty-eight hundredths acres; and the east half of Section twenty-nine, containing three hundred twenty acres;

Township six north of Range twelve west.

Section seven, containing six hundred forty acres; the east half of Section nineteen, containing three hundred twenty acres; the north-east quarter of Section twenty-three, containing one hundred
17 sixty acres; and the north half of Section twenty-nine, containing three hundred twenty acres;

Township seven north of Range twelve west.

The northeast quarter of Section nineteen, containing one hundred sixty acres; Section twenty-nine, containing six hundred forty acres; and Section thirty-three, containing six hundred forty acres;

Township six north of Range thirteen west;

The north half of Section five, containing three hundred twenty acres;

Township seven north of Range thirteen west.

The northeast quarter of the northwest quarter of the northeast quarter of Section twenty-three, containing ten acres; and the north-east quarter and the south half of Section twenty-five, containing four hundred eighty acres; and containing, in the aggregate, nine thousand six hundred eight and fifty-six-hundredths acres;

Now know ye, That the United States of America, in consideration of the premises and pursuant to said Acts of Congress, has given and granted, and by these presents does give and grant, unto the said Southern Pacific Railroad Company, successor in interest to the Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing; to have and to hold the said tracts, with the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said Southern Pacific Railroad Company, successor as aforesaid, and to its successors and assigns forever. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

18 In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the tenth day of February in the year of our Lord one thousand nine hundred

and fifteen and of the Independence of the United States the one hundred and thirty-ninth.

By the President:

[SEAL.]

WOODROW WILSON,
By M. P. LE ROY, *Secretary*.
JOHN O'CONNELL,
Acting Recorder of the General Land Office.

Recorded: Patent Number 457,322.

"EXHIBIT B."

Southern Pacific R. R. Co. Main Line Indemnity Patent No. 161.

Request for Elimination from Patent of Reservation for Right of Way for Canals and Ditches, etc.

JULY 16, 1915.

The Honorable the Secretary of the Interior.

SIR: On behalf of the Southern Pacific Railroad Company, I have the honor to invite your attention to patent No. 161, dated February 10, 1915, issued to the Southern Pacific Railroad Company, covering main line indemnity lands situated within
19 the Independence and Los Angeles land districts, California.

The patent as so issued, as above, contains the following concluding clause:

"And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

The above reservation was presumably inserted under the authority of the Sundry Civil Appropriation Act, of August 30, 1890, (26 Stat. 391, c. 837), and Departmental instructions issued thereunder, April 19, 1912, (42 L. D. 396), in these words:

"Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

An examination of the act just referred to will disclose that the same had no relation to railroad indemnity selections, but had reference solely to private entries under general law. The proviso of the act, *supra*, should not be construed apart from its context but should be interpreted in the light of the terms of the act which the proviso itself purports to limit; the terms of the act being thus:

"No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settle-

ment on the public lands or whose occupation, entry or settlement is validated by this act."

It would seem to necessarily follow that the proviso could not be broader, nor was it intended to be broader, in its scope, than
20 the terms of the act which it purports to qualify and limit.

Again, the indemnity proviso of the grant to the railroad company was intended to supply deficiencies in place; and it was undoubtedly the intent of Congress that lands granted and conveyed to the company pursuant to the indemnity provisions should be held by the same absolute title as lands taken under the primary grant. Therefore, where such lands are free from entry or withdrawal at the time the indemnity selection is made, and, as here when the patent issues, the contention would seem to be unanswerable, that there is no authority to limit or qualify the title to lands so conveyed to the company.

While, for the reasons above stated, there seems to be an absence of authority to insert such reservation in the above patents, nevertheless, its presence therein has the effect of creating an apparent cloud upon the title.

In view of the fact that said patent 161, in the form issued, is not the full and absolute evidence of title contemplated by the granting act, but is a title which at least purports to be burdened with an easement, it is respectfully requested that you will cause the necessary instructions to be issued for the re-issuing of said patent 161, eliminating therefrom the certain reservation hereinabove quoted; and, to that end, I hereby offer and tender the surrender of said patent No. 161, as so originally issued, as above, the same not having been recorded among the land records of any of the districts wherein the lands embraced therein are situated.

I have the further honor to request your early consideration and
21 action upon this request, in view of the fact that other indemnity patents will, from time to time, issue to said railroad company, and the Commissioner, in view of the certain Departmental instructions aforesaid, has denied my request for the issuance of such indemnity patents both past and future, except only in the form that includes a reservation of the kind above mentioned.

Respectfully,

A. A. HOEHLING, JR.,
Attorney for said Company.

"EXHIBIT C."

Department of the Interior,

D-39392.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, Nov. 3, 1915.

Mr. A. A. Hoehling, Jr., Attorney for the S. P. R. R. Co., 1416
F Street N. W., Washington, D. C.

DEAR MR. HOEHLING: Your petition of July 16, 1915, asking the Department to discontinue the insertion in patents issued to the

Southern Pacific Railroad Company for indemnity selections of the reservation prescribed in the act of August 30, 1890 (26 Stat., 391), departmental instructions (42 L. D., 396), has been given careful consideration, but the Department does not feel warranted in modifying or departing from the existing and established practice.

22 Your petition is therefore denied.

Very truly yours,

ANDRIEUS A. JONES,
First Assistant Secretary.

Rule to Show Cause.

Issued January 10, 1916.

* * * * *

Upon consideration of the petition filed in the above-entitled cause, it is, by the Court, this 10th day of January, 1916, ordered:

That the Respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, be, and they hereby are, required to show cause, if any they have, on or before the 28th day of January, 1916, at 10:00 o'clock A. M., why the writ of mandamus should not issue as in said petition prayed; provided, that a copy of the said petition and of this order be served upon said respondents on or before the 14th day of January, 1916.

ASHLEY M. GOULD, *Justice.*

Order Certifying Cause to Equity Court No. 2.

Filed January 26, 1916.

* * * * *

Upon mutual consent and arrangement, as authorized by Section 67 of the Code, and upon consent of counsel herein; it is, by
23 the Court, this 26th day of January, 1916, ordered:

That this cause be, and the same hereby is, certified for hearing and trial to the Associate Justice of this Court presiding over the special term in equity court division No. 2.

ASHLEY M. GOULD, *Justice.*

- We consent:

A. A. HOEHLING, JR.,
Attorney for Petitioner.

C. EDWARD WRIGHT,
Attorney for Respondents.

Return to the Rule to Show Cause.

Filed January 28, 1916.

* * * * *

Come now the respondents and by way of return to the rule to show cause issued on the petition of relator in the above-entitled action, say:

That while denying the relator's conclusions from the facts stated in the petition, they admit the averments of facts therein, save as in paragraph 5 and paragraph 7 contained; and as to the averments in said paragraphs, they deny that relator constructed, completed, and equipped a line of railroad in the manner and within the time prescribed by the granting act and the joint resolution therein referred to, and, on the contrary, state the fact to be that less than half of said railroad was constructed, completed and equipped within the time required by said granting act and joint resolution, and

24 that as late as September, 1890, only about 85% of said railroad had been constructed, completed and equipped as required by the terms of its granting act and the joint resolution aforesaid. They further aver that a part of said railroad, to wit, between Tres Pinos and Alcalde, has never been constructed and completed.

Further answering, they aver that they have duly executed, recorded, and delivered to relator a patent conveying the legal title of the United States to such lands (of the character and in the status as relator is entitled to take in indemnity) as were listed by the relator in its indemnity selection lists referred to in paragraphs 9 and 10 of the petition, and that said patent, identified in relator's petition as No. 161, is in such form and terms, and in such form and terms only, as respondents, acting under the authority of acts of Congress, are authorized to execute, record and deliver to the relator.

They further aver that all the lands conveyed by said patent No. 161 are situate west of the one-hundredth meridian of longitude.

Wherefore, having made complete answer to the rule, they pray that the same may be discharged, that the petition herein filed may be dismissed with their reasonable costs, and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

PRESTON C. WEST,
*Solicitor for the Department
of the Interior.*

C. EDWARD WRIGHT,
Assistant Attorney.

25 I, Franklin K. Lane, Secretary of the Interior, on oath depose and say that I have read over the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein set forth I am informed are true and I believe them to be true.

FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to this 27th day of January, 1916.

Before me:

[SEAL.]

W. BERTRAND ACKER,
Notary Public in and for D. C.

Demurrer.

Filed February 23, 1916.

* * * * *

Comes now the relator and says that the return and answer of the respondents in the above-entitled cause is bad in substance.

A. A. HOEHLING, JR.,
Attorney for Relator.

NOTE.—Among the matters of law intended to be argued in support of the foregoing demurrer are the following:

1. That no authority of law is therein set forth warranting or justifying the insertion of an easement reservation in the
26 certain land patent in the petition herein described.

2. That it appears therefrom that relator, by virtue of its land grant, is entitled to a patent conveying an absolute and unencumbered fee simple title to the lands embraced in said patent; and that the insertion therein of an easement reservation in favor of the United States was and is without authority of law, and is violative of the terms of said land grant under which said patent purports to have been issued.

3. That no good or legally sufficient reason is set forth therein why patent should not issue to relator, eliminating therefrom the certain easement reservation aforesaid; nor why a peremptory writ of mandamus should not issue requiring the respondents to cause patent to be issued and delivered to relator, as in the petition herein prayed.

A. A. HOEHLING, JR.,
Attorney for Relator.

Opinion.

Filed July 24, 1916.

* * * * *

A mandamus is sought in this proceeding to compel the Secretary of the Interior to re-issue to relator a certain land patent, eliminating an easement reservation contained in the original patent. reading:

“And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.”

27 The respondents contend that the easement reservation is provided for in Act of Congress of August 30, 1890 (26 Stat. L. 391), as follows:

“Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent de-

scribed, a right of way thereon for ditches or canals constructed by the authority of the United States."

The relator, on the other hand, contends that this provision of law should be limited in its construction so as not to apply to the land concerned in this proceeding, being indemnity land provided for in Acts of July 27, 1866 (14 Stat. L. 290), and Joint Resolution of June 28, 1870 (16 Stat. L. 382), for which the relator (in the event of loss of certain primary lands) might, "under the direction of the Secretary," make selections in alternate odd numbered sections within a certain distance. There is no doubt about the particular land in question being land "taken up" (or selected) subsequent to the Act of August 30, 1890, and, therefore, "hereafter taken up," as provided in said Act. This being so, and the Court being of opinion that the provision contained in said Act was intended to be a broad one, and not a limited one, the relator's contention cannot be sustained.

The law under which the plaintiff claims is one of the "land laws of the United States." See *Wisconsin R. Co. vs. Price*, 133 U. S. 496, 508; and *Weyerhaeuser vs. Hoyt*, 219 U. S. 380, 388.

In *Central Pacific Ry. Co. vs. Lane*, Equity No. 33,481, this day decided, the Court referred to and quoted from decisions of the Supreme Court as follows:

"The Supreme Court said in *Wisconsin R. R. Co. vs. Price* 28 County, 133 U. S. 496, 513, referring to opinions of attorneys general:

"The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

"In *Sjoli vs. Dreschel*, 199 U. S. 564, 565, the Court said:

"From the numerous cases in this court relating to the above act of July 2, 1864, the following propositions are to be deduced:
* * *

"That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior;

"That up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the pre-emption and homestead laws of the United States'; * * *

"This language was quoted with approval in *Osborn vs. Froyseth*, 216 U. S. 571, 578. In *Stalker vs. Oregon Short Line*, 225 U. S. 142, 149, the Court says:

"The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been

applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervenor. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser vs. Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case.' "

On these authorities the demurrer to the return to the petition is overruled. Serve copy of proposed decree with two days' notice of settlement.

By the Court:

WALTER I. McCOY, *Justice.*

29 *Order Discharging Rule and Dismissing Petition.*

Filed July 26, 1916.

* * * * * *

This cause came on to be heard upon relator's petition, the rule to show cause issued thereon, the answer and return of respondents to said petition and rule, and upon relator's demurrer to said answer and return, and was argued by counsel; whereupon, on consideration thereof, the court having been fully advised in the premises, it is, this 26th day of July, 1916,

Ordered, That the demurrer herein filed be, and the same is, overruled. And relator, having in open court elected to stand on said demurrer, it is further

Adjudged and Ordered, That the rule to show cause herein issued be, and the same hereby is, discharged, and that the petition herein filed be, and the same hereby is, dismissed, with costs to the respondents to be taxed by the clerk.

By the Court:

WALTER I. McCOY, *Justice.*

From the foregoing, the relator on the day aforesaid in open court prays an appeal to the Court of Appeals, and the same is hereby allowed; and the penalty of the appeal bond for costs is hereby fixed at \$100 or a deposit of \$50 in lieu thereof.

By the Court:

WALTER I. McCOY, *Justice.*

30

Memorandum.

July 26, 1916.—Bond on appeal for \$100. approved and filed.

Assignments of Error.

Filed July 26, 1916.

* * * * *

The appellant, The United States of America ex rel. Southern Pacific Railroad Company, a corporation, hereby designates the following assignments of error in the certain final judgment of the Court, entered in the above-entitled cause, July 26, 1916, in favor of respondents:

1. In holding that there is any provision of law authorizing or warranting the insertion in the land patent described in the petition herein for mandamus of the certain attempted easement reservation in favor of the United States.

2. In holding that the provisions of the certain Act of Congress, approved August 30, 1890, (26 Stat. 391), either have, or were intended to have, any application whatever to the railroad indemnity lands granted by Congress and involved in this proceeding.

3. In failing to hold that the provisions of said act, of August 30, 1890, supra, had and have relation only to private entries made upon the public lands of the United States under the general land laws; and had and have no application whatever to railroad indemnity lands granted to make up losses sustained from the grant or
31 lands within primary or place limits.

4. In overruling relator's demurrer to the return and answer of respondents; and in entering final judgment herein in favor of respondents.

5. In failing and refusing to grant the writ of mandamus prayed for herein.

6. Other errors appearing upon the face of the record.

A. A. HOEHLING, JR.,
Attorney for Appellant.

Service of copy of the above Assignments of Error acknowledged this 26 day of July, A. D. 1916.

C. EDWARD WRIGHT,
Attorney for Respondents.

Designation of Record on Appeal.

Filed July 26, 1916.

* * * * *

To John R. Young, Esq., Clerk Supreme Court, D. C.

DEAR SIR: On behalf of the above-named plaintiff and appellant, I request that you will cause to be prepared the transcript of record on appeal in the above-entitled cause; and I hereby designate the following to be included in said transcript:

1. Petition for mandamus, and all exhibits attached thereto, the same being marked Exhibits A, B and C.
- 32 2. Rule to show cause.
3. Order certifying cause to the Associate Justice presiding over equity court division No. 2.
4. Return and answer of respondents to rule to show cause.
5. Demurrer of relator to the return and answer of respondents.
6. Opinion of Court.
7. Order and judgment discharging rule to show cause, and dismissing the petition for mandamus, including endorsement thereon of appeal in open court and order fixing amount of appeal bond for costs.
8. Assignments of error.
9. Memorandum of approval and filing of bond for costs on appeal.
10. This designation.

A. A. HOEHLING, JR.,
Attorney for said Appellant.

Service of copy of above designation acknowledged, this 26th day of July, 1916.

C. EDWARD WRIGHT,
Attorney for Respondents.

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

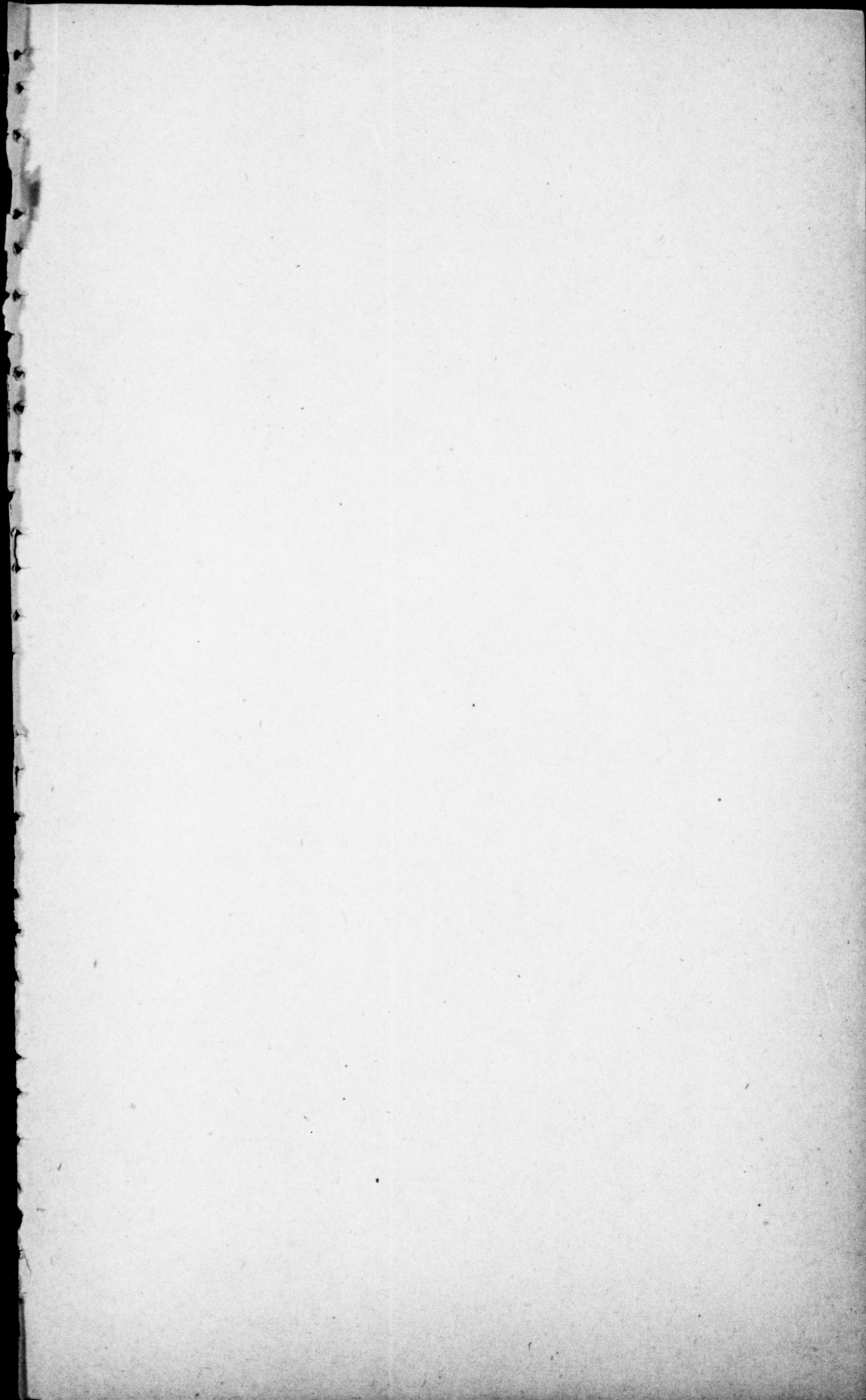
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 32, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 58737 at Law, wherein The United States of America, ex relatione Southern Pacific Railroad Company, a corporation, is Petitioner and Franklin K. Lane, Secretary of the Interior, et al. are Respondents, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of August, 1916.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3010. The United States of America ex relatione Southern Pacific Railroad Co., &c., appellant, vs. Franklin K. Lane, Secretary of the Interior, et al. Court of Appeals, District of Columbia. Filed Sep. 1, 1916. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 5-1916

Henry W. Hodgson
Clerk

Court of Appeals, District of Columbia.

OCTOBER TERM, 1916.

No. 3010.

THE UNITED STATES OF AMERICA *EX RELATIONE*
SOUTHERN PACIFIC RAILROAD COMPANY, AP-
PELLANT,

vs.

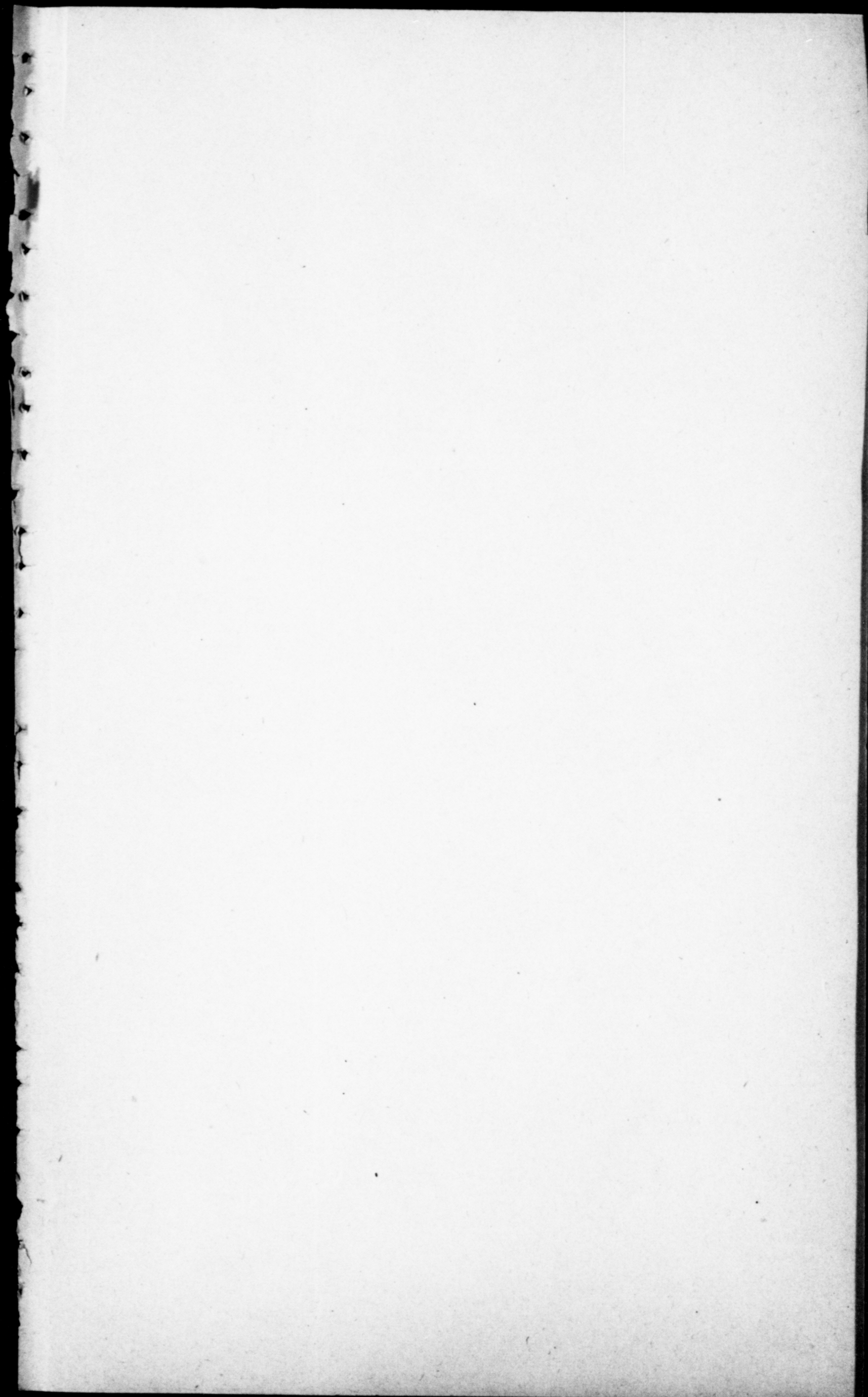
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND
CLAY TALLMAN, COMMISSIONER OF THE GENERAL
LAND OFFICE.

BRIEF ON BEHALF OF APPELLANT.

A. A. HOEHLING, JR.,
Attorney for Appellant.

HOEHLING, PEELLE & OGILBY,
Of Counsel for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



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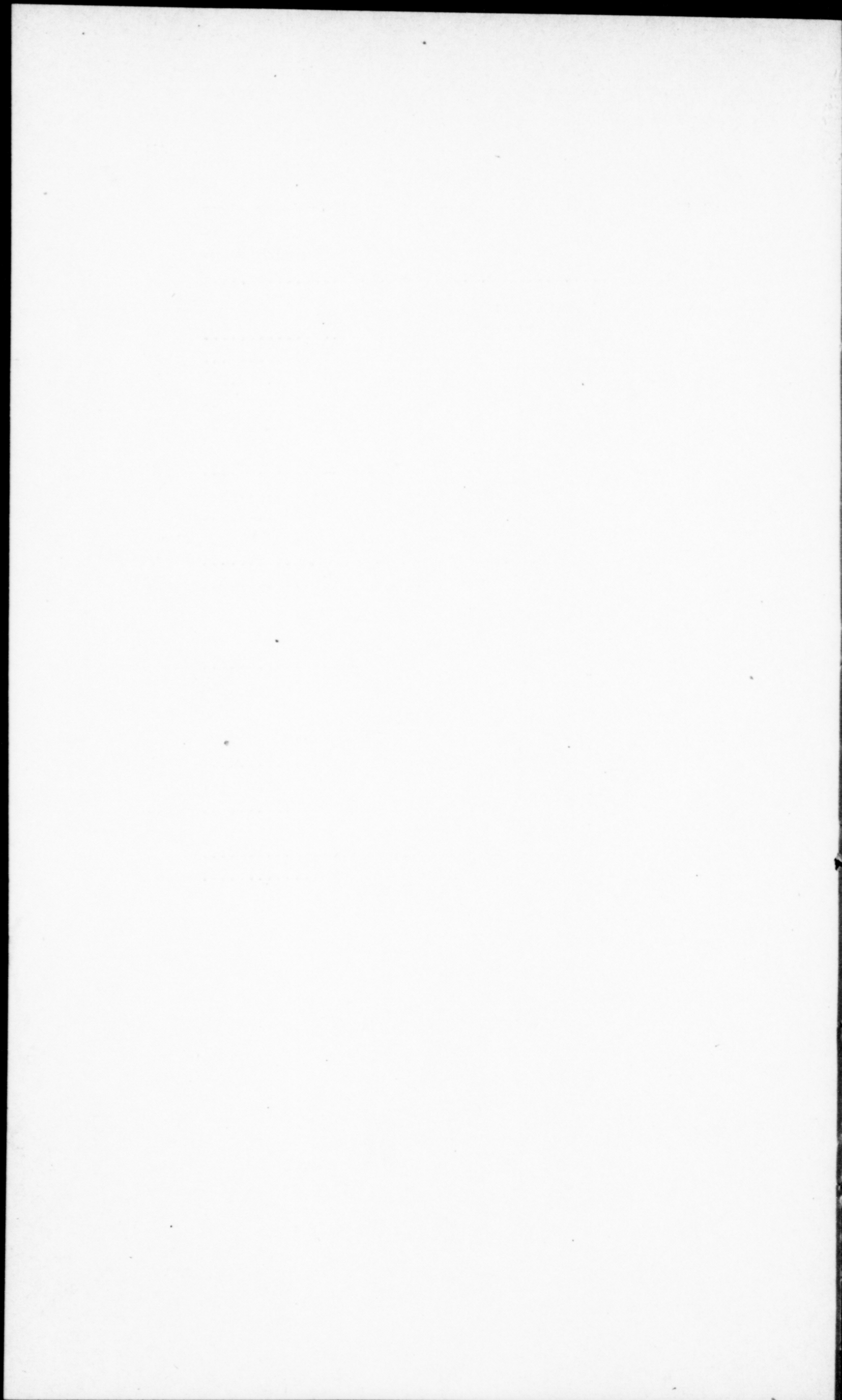
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(32090)



Court of Appeals, District of Columbia.

OCTOBER TERM, 1916.

No. 3010.

THE UNITED STATES OF AMERICA EX RELATIONE
SOUTHERN PACIFIC RAILROAD COMPANY AP-
PELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND
CLAY TALLMAN, COMMISSIONER OF THE GENERAL
LAND OFFICE.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

By an act of Congress approved July 27, 1866 (14 Stat., 292), hereinafter more particularly referred to, a grant of lands was made to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast. The land-grant comprises *two* classes of limits, one of *primary* or *place* lands, and the other of

1h

*No forfeiture act of Congress ever applied
to these lands*

indemnity lands, to supply *losses* sustained within said primary or place limits resulting from some *prior* right or lawful claim thereto. Otherwise, however, the grant, so far as character, quality, and title are concerned, is exactly the same as to both primary and indemnity lands. The grant so made was one *in fee*, without exception, reservation, qualification, burden, or easement of any kind or character whatsoever.

The exact question involved in this case may be stated in few and simple words, and it is as follows:

The land-grant aforesaid has been in process of administration for now over half a century, although the same has not as yet been completely adjusted and patented. Land patents have been issued to said company, from time to time during the years, for both classes of lands, primary and indemnity, and, covering a period of some *forty-six* years, the conveyance thereof has always been an absolute fee, unrestricted and unfettered by easement reservation, attempted or otherwise.

Under date February 10, 1915, the Department of the Interior issued to appellant company patent No. 161, embracing some 9,608.56 acres of lands within the *indemnity* limits, and in that patent there was inserted the following attempted reservation of easement:

“And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States” (R., 11).

The railroad company, having endeavored in the Department, but without avail, to secure the issuance of patent conveying to it the full measure of title, absolute and unfettered, as contemplated and required by the granting act aforesaid, filed the present proceeding in *mandamus*.

The respondents, by way of defense, insist that the insertion of such attempted reservation is both proper and re-

quired because of a certain other act of Congress approved August 30, 1890 (26 Stat., 391), enacted some twenty-four years after the land-grant aforesaid, although said later legislation had and has no relation whatever to said prior grant, as will be shown below.

It is not without significance that, notwithstanding said act of 1890, the Department thereafter continued its administration of this and all other similar railroad land-grants, and issued patents for *indemnity* lands as theretofore, and it was not until April 19, 1912, *over twenty-one years after the passage of said act of 1890*, that the Department reversed its long-continued interpretation and practical construction of said act, and began the insertion in patents for indemnity lands of the objectionable clause of which complaint is here made.

The court below sustained the contention of respondents and entered judgment dismissing the petition, and from that judgment this appeal is taken (R., 18).

The only question here involved is whether the patent in question conveys to appellant company title of the kind, character, and quality to which it is entitled under the certain land-grant above mentioned.

The questions involved herein are thus summarized in the

Assignments of Error.

1. In holding that there is any provision of law authorizing or warranting the insertion in the land patent described in the petition herein for *mandamus* of the certain attempted easement reservation in favor of the United States.

2. In holding that the provisions of the certain act of Congress, approved August 30, 1890 (26 Stat., 391), either have, or were intended to have, any application whatever to the railroad indemnity lands granted by Congress and involved in this proceeding.

3. In failing to hold that the provisions of said act, of August 30, 1890, *supra*, had, and have, relation only to private entries made upon the public lands of the United States under the general land laws; and had and have no application whatever to railroad indemnity lands granted to make up losses sustained from the grant of lands within primary or place limits.

4. In overruling relator's demurrer to the return and answer of respondents; and in entering final judgment herein in favor of respondents.

5. In failing and refusing to grant the writ of *mandamus* prayed for herein.

6. Other errors appearing upon the face of the record (R., 19).

Before considering the legal questions involved it will be useful to analyze briefly the *land-grant* under which this case arises.

THE LAND-GRANT.

Congress, by act approved July 27, 1866 (14 Stat., 292), entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," authorized the Southern Pacific Railroad Company of California to construct a railroad and telegraph line, upon and under certain conditions and stipulations expressed in the act, to connect with the Atlantic & Pacific Railroad Company at such point near the boundary line of the State of California as the companies named should deem most suitable for a railroad line to San Francisco, and the act contained a grant of lands to certain railroad corporations named, including specifically said Southern Pacific Railroad Company, of—

"every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the

Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State" (Sec. 3).

This is the grant of what is known as *primary* or *place* lands.

The grant then thus provided:

"and whenever, * * * any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers * * * *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections nearest to the line of said road and within twenty miles thereof, may be selected as above provided: *And Provided further*, That the word 'mineral,' when it occurs in this act shall not be held to include iron or coal" (Sec. 3).

This is what is known as the *indemnity* grant.

Section 4 of the act provided that, whenever twenty-five consecutive miles of any portion of the railroad was completed and ready for service, the President of the United States should appoint three commissioners to examine the same and make report under oath to the President, and thereupon—

"patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road."

Section 6 of the act directed the President of the United

States to cause the lands to be surveyed for forty miles in width on both sides of the entire line of the road, and as fast as may be required by the construction thereof.

Section 8 provided that the grant and privileges contained in the act were upon condition that the company should commence and complete its road within a certain prescribed period.

Section 11 of the act made the railroad, when constructed, to be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, as well as subject to such regulations as Congress might impose, restricting the charges for Government transportation.

Section 12 of the act required the company to signify its acceptance in writing of the terms of the grant.

Section 18 of the act was the one that made all of its terms and provisions specifically applicable to the Southern Pacific Railroad Company.

The Southern Pacific Railroad Company accepted the grant and filed its written acceptance with the Secretary of the Interior as required by the act.

Later on, June 28, 1870 (16 Stat., 382), Joint Resolution was passed by Congress and approved, whereby a certain line of road that had been adopted by the company was approved, and said resolution specially required the issuance of patents to the company upon completed sections of the railroad line, as follows:

“and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said

company by said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

The Southern Pacific Railroad Company was thereafter constructed, the completed sections of the constructed road having been duly accepted, upon sworn report of the Commissioners, as required by the granting act. Appellant is the successor (by consolidation) of the company of the same name hereinabove referred to, and as such has become the legal successor in interest of all of the properties and franchises of the former, including said land-grant (R., 5).

By an act approved March 3, 1887 (24 Stat., 556), the Secretary of the Interior was "authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land-grants made by Congress to aid in the construction of railroads and heretofore unadjusted." While the railroad has been constructed, completed, equipped, and operated for very many years, with all of the incidental benefits to the United States, the land-grant itself remains unadjusted (R., 5).

From what has been stated, it will be noted that Congress made a grant of lands to the railroad company, absolute in character and quality, and without limitation, burden, or reservation of any kind.

THE FACTS.

Appellant company heretofore filed in the United States local land offices at Independence and Los Angeles, California, respectively, certain *indemnity* selection lists embracing, *inter alia*, the lands that are included in the patent above mentioned, and assigned good, sufficient, and valid base therefor of tracts of equal area with those lost within

its primary or place limits, and which selections were accompanied by the fees collectible by law, and said company otherwise met in every requirement the rules and regulations of the Department of the Interior in respect of railroad indemnity selections. The selections were duly certified by the Register and Receiver of the two local land offices named, and thereafter were transmitted to the General Land Office of the Department of the Interior for further action thereon.

Certain of the lands embraced within said indemnity selections, and aggregating 9,608.56 acres, were thereafter duly *clear-listed* (as the expression is in the Department) and *approved* by the Department of the Interior for patenting to said company, the same having been found to be lands to which it was properly entitled under the *indemnity* provisions of said land-grant, and thereupon patent issued to it, No. 161, dated February 10, 1915, containing lands aggregating the quantity just mentioned. A true copy of the patent is attached to the petition as Exhibit "A" (R., 9-12).

An examination of that patent will disclose that it thus concludes:

"And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States" (R., 11).

Thereafter said company endeavored to secure the re-issuance of patent for the lands described, from which should be eliminated the stated reservation above quoted, and to that end it tendered the surrender of said patent No. 161 as originally issued, and requested the re-issue thereof in proper form, and without limitation, qualification, restriction, or reservation, and in that behalf it addressed formal communication to the Secretary of the Interior dated July 16, 1915, a true copy whereof is attached as Exhibit "B" to the petition (R., 12-13), but which appli-

cation was denied by the Secretary November 3, 1915, a true copy of said ruling being likewise attached to said petition as Exhibit "C" (R., 13-14).

The title to each and all of the tracts embraced in said patent remains as it was at the date of the issuance thereof; said patent has not been placed of record in any of the land districts or counties wherein the lands are situated or elsewhere; no change in the title to said tracts has occurred since the issuance of said patent, and there is nothing outstanding which would or could in any way interfere with the surrender of the original patent and its reissuance in proper form, as so requested, as above (R., 7).

BRIEF.

1.

THE STATUTORY CONTRACT EFFECTED BY THE ACT OF JULY 27, 1866 (14 STAT., 290), AND JOINT RESOLUTION OF JUNE 28, 1870 (16 STAT., 382).

The act of July 27, 1866, *supra*, was one entitled—

"An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast."

It was intended to be just what its title indicates, namely, a *grant* of lands to aid in the railroad construction described.

The nature of the *statutory contract* between the Government grantor, on the one hand, and the railroad company grantee, on the other, was thus well summed up by the Supreme Court of the United States (Mr. Justice Van Devanter) in the case of *Burke vs. Southern Pacific R. R. Co.*

(234 U. S., 669, 680), wherein was involved the land-grant made to this same company:

“Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti vs. Dillon*, 167 U. S., 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant should not be treated as a mere gift.”

Again, the same court (Mr. Chief Justice White), in the case of *Weyerhæuser vs. Hoyt* (219 *id.*, 380, 387), thus stated as to the character of a railroad *indemnity* grant, and what it was intended to be and is in fact and law:

“It is beyond dispute on the face of the granting act of July 2, 1864, c. 217, 13 Stat., 365, 367, and of the joint resolution of May 31, 1870, c. 67, 16 Stat., 378, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a *substantial right* to land within the *indemnity* limits in lieu of lands lost within the place limits.” (Italics by counsel.)

Again it was held by the same court (Mr. Justice McKenna), in the case of *Oregon & California R. R. Co. et al. vs. United States* (238 *id.*, 393, 394), as follows (*syllabus*):

"In construing land-grant statutes, the courts cannot, even at the instance of the Government, give a greater sanction to them than Congress intended; nor can the courts give to any parties rights which the statutes did not confer upon them."

The words of the land-grant here under review are: "That there be, and hereby is *granted*," etc.

Even in its early common-law significance, a *grant* was always understood and construed to mean a conveyance of the *estate and interest of the grantor* in the lands granted.

A *public grant*, such as is here involved, is the mode and act of creating a title in an individual or corporation to lands which had previously belonged to the Government.

It is an elementary law of real property that, when a grantor desires and intends *to exclude* a part or portion of the property granted, he does so by means of what is called an *exception* inserted in the grant or conveyance; and, on the other hand, when he desires and intends *to retain* some right or interest issuing out of the property granted, he does so by means of what is called a *reservation*, which latter is inserted appropriately in the grant or conveyance.

But if there be *no* such exception or reservation contained in the grant or conveyance, the *whole* property described, and the *entire interest* therein of the grantor, and without limitation, passes by the unqualified grant thereof.

In the railroad grant here under consideration, there was neither exception nor reservation of any kind, character, or description whatsoever, the language of the statute being an *absolute* grant, as above explained.

Under every fundamental rule and law of real property, that grant was intended to pass, and did, in fact and in law, operate to pass, the *entire* title, interest, and estate of the Government grantor.

In the practical operation as well as construction placed upon the various land grants made by Congress to aid in the construction of railroads, there is no difference, so far as the legal *quality* of the grant is concerned, between the grant of lands within *primary* or *place* limits and that of lands within the *indemnity* limits—they are both alike *granted* lands (Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 9 L. D., 465, 468).

It was long ago settled that the right of a railroad grantee to lands within its *primary* or *place* limits *attaches* and becomes *fixed*, if at all, upon the filing of its map of *definite location* (Van Wyck *vs.* Knevals, 106 U. S., 360, 366; Kan. Pac. Ry. Co. *vs.* Dunmeyer, 113 *id.*, 629); and as to lands within its *indemnity* limits, upon *selection*, or, as it has been expressed “at the moment of choice” (Ryan *vs.* Central Pacific Ry. Co., 99 *id.*, 382; Weyerhæuser *vs.* Hoyt, 219 *id.*, 380; U. S. *vs.* Southern Pacific R. R. Co., 223 *id.*, 560, 570).

But in either case, when the right of the railroad grantee becomes *fixed* as to any particular tract of land within the designated limits, *primary* or *indemnity*, as the case may be, it is entitled, by virtue of the grant contained in the statutory contract entered into between it and the Government, to conveyance of the *absolute* fee-simple title to the property, unfettered and unburdened—in short, the *entire* estate and title of the Government as grantor of the property and not a title of lesser or inferior character, quality or estate.

2.

EVEN IF CONGRESS HAD ATTEMPTED TO DO SO (BUT WHICH IT HAS NOT), THE STATUTORY CONTRACT (LAND-GRANT) AFORESAID, COULD NOT THEREAFTER BE MODIFIED OR CHANGED, EXCEPT BY MUTUAL CONSENT OF THE CONTRACTING PARTIES.

As will later be shown, Congress has never, in any way, indicated even the slightest intention to interfere with or im-

pair the land-grant above referred to; but if it had, its action in that regard, in the case of a solemn statutory compact, involving a land-grant fully earned long years ago, and for which the Government received, and is still receiving, the agreed consideration, would be unavailing.

Thus, in the early case of *Wilcox vs. Jackson* (13 Pet., 498, 513), decided in 1839, the Supreme Court laid down the rule, and which has ever since been followed:

“But we go further and say that, wheresoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.”

That same rule has been consistently followed during the years:

Stoddard vs. Chambers (2 How., 284).
Bissell vs. Penrose (8 How., 317).
Steel vs. Smelting Co. (106 U. S., 447).
Reynolds vs. Iron Silver Min. Co. (116 *id.*, 687).
Wright vs. Roseberry (121 *id.*, 488).
Doolan vs. Carr (125 *id.*, 618).
Lake Superior, &c., Co. vs. Cunningham (155 U. S., 354, 373).

In the case last cited, *Lake Superior, &c., Co. vs. Cunningham* (155 U. S., 354, 373), the Supreme Court thus summed up the doctrine and rule:

“General terms in a subsequent grant are always held *not* to include lands embraced within the terms of the prior grant. Even a patent may be declared void if issued for lands theretofore reserved from sale. This is the settled rule of this court.” (Citing the prior cases, *supra*).

Again, in the Sinking Fund Cases (99 U. S., 700, 718, 719), the Supreme Court (Mr. Chief Justice Waite), decided in 1878, thus disposed of the question of the right or otherwise of the United States to ignore, alter, or impair its railroad land-grant contracts:

"The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. *No change can be made in the title created by the grant of the lands, or in the contract for subsidy bonds, without the consent of the corporation.* All this is indisputable." (Italics by counsel.)

And the same court, back in 1819, in the Dartmouth College Case (4 Wheat., 518), laid down a similar rule of prohibition as against the States.

From what has been stated, it results that the insertion of the attempted easement reservation in the patent involved in this suit finds no justification whatever in the land-grant and statutory contract above referred to; and that the inclusion thereof operates as an attempt on the part of the Government grantor *to reserve to itself* a right inconsistent

with said land-grant, thereby casting a cloud upon the title of petitioner to its granted lands.

It is not only a cloud upon its title, but a very serious one at that, since it at once places upon the lands a claim of *perpetual easement* in favor of the United States to construct ditches or canals across the same; and, naturally, the value of these lands to the company will be seriously lessened and impaired, as purchasers are not readily found who are willing to run the risk of having their property, at some time in the future, traversed by ditches or canals.

And right here it may be observed that such attempted easement reservation is not in respect of any *existing* ditch or canal, nor is it even in respect of any pending or present project.

As further indicating the impropriety of the insertion of such clause in railroad indemnity patents, it may be useful to refer to H. R. 8807, introduced by Mr. Hayden, January 12, 1916, whereby the *proviso* aforesaid of the act of August 30, 1890, is proposed to be amended and *enlarged*, so that the easement reservation shall read:

“for ditches, canals, *roads, trails, and telephone lines* constructed by the authority of the United States.”

That bill says nothing about applying said easement reservation to railroad *indemnity* patents; but, inasmuch as the Secretary of the Interior now asserts the right to insert in all railroad *indemnity* patents a reservation “for ditches or canals” (under the assumed authority of the act of August 30, 1890, *supra*), he doubtless will enlarge the reservation, should the above bill become a law, so as to make it include “ditches, canals, *roads, trails, and telephone lines* constructed by the authority of the United States”—thus so loading up and encumbering the fee for all time as to make it of exceedingly doubtful marketable value.

Could a situation more preposterous be imagined than one where the Government, having solemnly contracted to *grant* certain lands (namely, its *entire* title and estate therein), *in*

aid of the construction of a railroad which it then needed and desired, and having thereby obtained the construction of such railroad, as well as other agreed considerations for the grant, now proposes *to retain* to itself, and in the lands so granted the right, at any time in the future, no matter how remote, to dig a "ditch or canal" across the land; or (should the above Hayden bill be enacted into law, and thereafter be construed by the Secretary as applicable to railroad *indemnity* lands, and which, under his action in this case, would inevitably follow, unless the Department should again change its ruling), the right, at any time in the future, no matter how remote, not only to dig a "ditch or canal" across the land, but to cut "roads" and "trails," through and across it, as well as to string telegraph lines through it. There is neither limit, boundary, location, nor extent as to the proposed easement, save only the boundary lines of the land patented; so that any or either of the subjects of the proposed easement could be run through a given tract of 40 acres, for example, at any place or places and of any width, and this irrespective of whether it would run through some then existing improvement or not.

The unauthorized insertion in the patent here in suit of an attempted easement reservation constitutes a cloud upon the absolute fee-simple title to which appellant company is entitled under its land-grant, quite as much so as the situation involved in the case of *Lane, Secretary of the Interior, vs. Watts* (234 U. S., 525, 540), where the court enjoined the Secretary of the Interior and the Commissioner of the General Land Office from taking action in hostility to a title which had theretofore passed out of the Government by the location of what is known as the Baca grant, and the approval thereof by the Land Department, the court there treating the suit as one to restrain the officials named from an illegal act under color of their office which would cast a cloud upon the title of the heirs of Baca, the owners of the land there involved.

It having thus appeared that the insertion of said attempted easement reservation is not justified or warranted by the granting act itself, it next remains to be considered whether or not Congress (even had it the power so to do, but which it has not, as above shown), has, in fact, undertaken to authorize or direct the lessening or impairing of the title granted to the railroad company in respect of the lands mentioned, by the clause inserted in the patent described.

3.

THE PROVISIO TO THE SUNDRY CIVIL APPROPRIATION ACT OF AUGUST 30, 1890 (26 STAT., 371, 391), AND THE CONTEMPORANEOUS AND UNIFORM CONSTRUCTION, FOR A PERIOD OF OVER TWENTY-ONE YEARS, GIVEN TO SAID PROVISIO BY THE DEPARTMENT CHARGED WITH THE DUTY OF EXECUTING SAID STATUTE.

By the Sundry Civil act passed by Congress and approved October 2, 1888 (25 Stat., 505, 526-527), an appropriation was made to enable the Geological Survey, under the direction of the Secretary of the Interior, to investigate the extent to which the arid region of the United States can be redeemed by irrigation, the segregation of the irrigable lands in such arid region, and the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and in connection therewith that act thus provided:

"And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law."

By the provision above quoted there were withdrawn from "entry, settlement, or occupation," until further provided by law, lands which might thereafter be designated by the United States surveys for "sites for reservoirs, ditches or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches or canals."

The words "entry, settlement or occupation" have a perfectly well-known, as well as long-established, meaning in the Land Department; they relate to the initiation, or acquisition, of rights by an individual or individuals in the public lands of the United States under public-land laws having *general* application; they have no relation whatever to *special* land-grants made by Congress to an individual or corporation, such, for example, as a grant of lands made *to aid in the construction of a railroad*.

Next came the Sundry Civil Appropriation Act, approved August 30, 1890 (26 Stat., 371, 391), which expressly repealed the above provision, and further enacted as follows:

"so much of the act of October 2, 1888, * * * as provides for the withdrawal of the public land from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

"No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has

heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

It is the language of the *proviso* found in the paragraph just quoted that is relied upon by respondents as justifying and requiring the insertion in railroad *indemnity* patents of an easement reservation in favor of the United States for the construction of ditches or canals.

An examination of the language of the above act will disclose that it had no relation whatever to *selections* made under railroad land-grants as to either primary or indemnity lands, and which selections are in no sense either an "occupation, entry, or settlement," but had reference *solely* to private entries made under the provisions of *public* land laws having *general* application. That the act itself had and has no possible application to *railroad selections* is further made perfectly manifest from the fact that it contains a limitation upon the *aggregate* amount of land, 320 acres, that may be acquired by any person under *all* of the land laws, a provision utterly inapplicable to *railroad* land-grants.

As above noted the provision as to the insertion of easement reservations—

"in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian,"

is found in the *proviso* to the act, immediately following the provision in respect of persons who "enter upon any of the

public lands with a view to occupation, entry, or settlement under any of the land laws," and whose aggregate holding (acquisition of title) is limited to 320 acres under *all* of said laws.

It is a perfectly well-settled rule of statutory construction that a proviso must be interpreted, not apart from its context, but in the light of the terms of the act to which the proviso itself is attached, and, ordinarily at least, a proviso can have no existence separate and apart from the provision which it is designed to limit. Also, where it follows and restricts an enacting clause, general in its scope and language, it is to be strictly construed and limited to the objects fairly within its terms. It is generally stated that a proviso is to be construed with reference to its *immediate* antecedent or to the immediately preceding parts of the clause to which it is attached, and that it limits only the passage to which it is so appended and not the whole section or act, or at least only the section with which it is incorporated (Endlich, Interpretation of Statutes, sec. 186).

Not only must the *proviso* in question be construed as being limited in operation to the cases embraced in the subject-matter to which it is attached, as has been above shown; but it must also be so construed as not to change the title created by the grant made by Congress of these railroad lands (*supra*).

Bearing in mind these fundamental rules of statutory interpretation and construction, it is not only interesting, but instructive as well, to ascertain the construction placed upon said act of 1890 by the Interior Department, which was charged not only with the administration of that act, but also with the administration of all of the public land laws of the United States and of the several land-grants made by Congress.

From and after the passage of said act of 1890, and for some thirteen years thereafter, it apparently never occurred

to any one to contend that said *proviso* had any application to land-grants made in aid of the construction of railroads; but, under date March 28, 1903, the Director of the Geological Survey addressed a communication to the Secretary of the Interior in which he called attention to the above proviso, and requested the opinion of the Department as to the applicability thereof, or otherwise, as to certain cases mentioned, including therein *specifically* railroad *indemnity* lands, where the selection thereof was made *subsequent* to said act of August 30, 1890. The Secretary referred the communication to the Commissioner of the General Land Office for report, and the latter made report thereon to the Secretary April 9, 1903, wherein he concluded as follows:

“In response I have to report, that this office has never construed the act aforesaid as applicable to any of these cases, nor to other than entries under the public or general land laws, nor has the Department so construed it in so far as I am aware.”

Thereupon the Secretary of the Interior made reply to the above communication, under date June 4, 1903, wherein he enclosed copy of said report of the Commissioner of the General Land Office, and stated that he believed the Commissioner had placed the proper construction upon the provisions of said act, and he accordingly so advised the Director of the Geological Survey.

The Secretary's said instructions are reported in 32 L. D., 147; but as the full text of the communication from the Director of the Geological Survey, and of the report of the Commissioner thereon, *supra*, do not appear in said printed instructions, counsel obtained from the Interior Department duly certified copy of each thereof, and the same are printed in full in the appendix to this brief, *post* (Nos. 1, 2, and 3. respectively).

No further question apparently arose in connection with the construction of said act, and patents for railroad indem-

nity lands continued to issue as theretofore, until about April 13, 1912, when the Commissioner of the General Land Office, calling attention to a then-recent Departmental order directing the insertion, in approvals of *rights of way* granted under various easement acts, of a reservation right of way through the same lands for ditches or canals constructed by the authority of the United States, asked the Secretary of the Interior for instructions as to whether a similar reservation should be inserted in patents issued for lands *granted* to railroad companies, and in patents for *indemnity* selections made by such companies, etc. That brought forth Departmental Instructions, dated April 19, 1912, wherein the then First Assistant Secretary of the Interior directed that as to lands granted to railroad companies within *primary* limits, and where the right thereto became fixed by definite location *prior* to August 30, 1890, (the date of the certain act aforesaid), the easement reservation should not be inserted; but that, as to all railroad *indemnity* lands selected *subsequent* to the date of the passage of said act of 1890, the easement reservation should be inserted in said patents. Those were the instructions that resulted in the insertion of the attempted easement reservation in the *indemnity* patent here in suit, and out of which the present controversy arose.

The instructions last mentioned are reported in 42 L. D., 396, and printed in full in the appendix to this brief, *post* (No. 4).

From what has been above stated, it results that from August 30, 1890, to April 19, 1912, a period of over *twenty-one* years, it was the settled and uniformly applied construction of said act by the Department charged with the execution thereof that it had no application to patents issued to railroad grantees for *indemnity* lands.

Both in the certain Departmental Instructions of April 19, 1912, *supra*, and in the position taken by respondents herein the Department of the Interior not only passes by in

silence, but entirely ignores, the fact of its contemporaneous and long-continued construction of the very act here in question.

It has been repeatedly held by the Supreme Court of the United States that contemporaneous and long-continued construction of a statute by those charged with its execution and administration is entitled to great weight, and ought not to be overruled, except for cogent reasons, and unless it be perfectly manifest that such construction is erroneous.

There are decisions innumerable in support of the proposition just stated, but the following will probably suffice to illustrate the point:

In the case of *United States vs. Moore* (95 U. S., 760, 763) the following was stated in the opinion:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

Again, in the case of *United States vs. Johnston* (124 *id.*, 236, 253), the following was stated in the opinion:

"the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

Again, in the case of *United States vs. Alabama Railroad Company* (142 *id.*, 615, 621), the following was stated:

"It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden

change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

The above language was cited with approval by the same court in the case of *Hewitt vs. Schultz* (180 *id.*, 139, 157). In that case there was involved a situation which arose out of the fact that the Interior Department had placed a certain construction upon railroad land grants and which it had followed for a number of years, and subsequently changed that construction.

Also, in the case of *United States vs. Hammers* (221 *id.*, 220, 228), the court had occasion to examine the provisions of what is known as the Desert Land Act, and again announced the above rule as follows:

"We cannot assume that the Land Department did not know what it was about and made its practice under the act oppose its construction of the act.
* * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. At any rate, their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive."

It therefore results, not only that said proviso to the act of 1890 does not purport to have any relation to railroad indemnity patents, but, on the contrary, it is necessarily limited to private entries made under the general or public land laws; and, furthermore, the contemporaneous, long-continued (*over twenty-one years*), and uniform construction placed upon said proviso by the Department charged with its execution and administration should not be "disre-

garded or overturned except for cogent reasons" (*supra*), and no such reasons appear.

This particular branch of the case may well be summed up in the concluding language of the Secretary of the Interior in the certain Departmental Instructions of June 4, 1903, *supra*, wherein he stated:

"but upon due consideration of the question, having in view the peculiar language employed by said act, to wit: 'In all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act,' and the recognized significance in the Land Department of the terms 'taken up under any of the land laws,' 'entries or claims,' as well as the character and class of claims validated by said act, I am constrained to believe that the General Land Office has placed the proper construction upon the provisions of this act, and you are so advised."

4.

THE PATENT HERE IN SUIT DOES NOT CONVEY TO APPELLANT COMPANY THE FULL MEASURE OF TITLE INTENDED AND REQUIRED BY THE LAND-GRANT.

The intent of Congress in the certain land-grant hereinbefore mentioned was that the lands granted and thereafter patented to the railroad grantee pursuant to the *indemnity* provisions of the grant should be held by the same absolute title as lands under the *primary* grant; and, therefore, where such lands are free from entry or withdrawal at the time the indemnity selection is made, and, as here, when the patent issues, there is no authority to limit or qualify the title to the lands so conveyed to the company.

If what has now been stated is correct, as matter of fact and law, it must result that the patent in question, in the form issued, is not the full and absolute evidence of title contemplated and required by the granting act, but is a title

which, at least, purports to be burdened with an easement, and which latter should be eliminated therefrom.

5.

THERE IS HERE INVOLVED NOTHING IN THE WAY OF DETERMINATION OF FACTS OR THE EXERCISE OF JUDGMENT OR DISCRETION BY THE RESPONDENTS—MERELY THE MINISTERIAL DUTY AND ACT OF ISSUING PATENT TO APPELLANT COMPANY CONFIRMING TO IT, IN APPROPRIATE FORM, THE FULL MEASURE AND QUALITY OF TITLE INTENDED AND REQUIRED BY THE LAND-GRANT AFORESAID, AS TO WHICH MANDAMUS IS THE PROPER REMEDY.

In the present case there is nothing in the way of ascertaining facts or exercising judgment or discretion on the part of respondents, all such matters having been resolved in favor of appellant company by the conveyance made to it in the above patent No. 161, dated February 10, 1915, covering the certain indemnity lands therein described—thus leaving for determination herein the single question, whether that patent is in the form and conveys to the railroad company title of the full *measure* and *quality* required by the land-grant aforesaid.

Nothing is here asked, and nothing is here required, save only the performance by respondents of the mere ministerial duty and act of issuing patent, in appropriate form, which shall convey and confirm the absolute unencumbered fee-simple title to the lands described.

Section 453, R. S. U. S., imposes the duty upon the Commissioner of the General Land Office, "under the supervision of the Secretary of the Interior," of "issuing patents for all grants of land under the authority of the Government."

As hereinabove shown, section 3 of the act of July 27, 1866, *supra*, defined the extent and quality of the land-grant therein provided (made expressly applicable to the Southern Pacific Railroad Company by section 18 of that act), and by section 4 thereof it was specifically provided that upon the completion of twenty-five-mile sections of railroad—

“patents of lands, as aforesaid, shall be issued to said company, *confirming* to said company the *right* and *title* to said lands situate opposite to and coterminous with said completed section of road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness, as aforesaid, and verified by said Commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road is completed, as aforesaid.” (Italics by counsel.)

And in the Joint Resolution of June 28, 1870, *supra*, it was further provided that, upon the construction of sections of said railroad and the verification and report thereof by the Commissioners as provided and required by the above act of July 27, 1866,

“it shall be the *duty* of the said Secretary of the Interior *to cause patents to be issued to said company* for the sections of land coterminous to each constructed section reported on, as aforesaid, to the extent and amount granted to said company,” etc. (Italics by counsel.)

Under the express and mandatory provisions of this land-grant, it is made to be the *duty* of the Secretary of the Interior *to cause patents to be issued* to the railroad grantee for the lands so granted, *confirming* to it the *right* and *title* to said lands.

The Secretary here has caused a patent to issue for certain lands under the provisions of said land-grant; but instead of *confirming* to the grantee the *right* and *title* to the lands embraced therein as secured by said granting act, he has undertaken, without lawful right or authority, *to retain* to the United States a part of such *right* and *title*.

In such case *mandamus* is not only the proper, but the only, remedy.

Thus in *Barney vs. Dolph* (97 U. S., 652, 656) it was held:

“The execution and delivery of the patent after the right to it is complete, are the mere ministerial acts of the officer charged with that duty.”

Again, in the case of *Simmons vs. Wagner* (101 *id.*, 260-261) it was stated:

“Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty.”

In the case of *Garfield, Secretary of the Interior, vs. U. S. ex rel. Goldsby* (211 U. S., 249, 261, 262) it was stated:

“It is insisted that *mandamus* is not the proper remedy in cases such as the one now under consideration. But we are of opinion that *mandamus* may issue if the Secretary of the Interior has acted wholly without authority of law. Since *Marbury vs. Madison*, 1 Cranch., 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. The subject was under consideration in *Noble vs. Union River Logging*

Railroad, 147 U. S., 165, 171, and Mr. Justice Brown, delivering the opinion of the court, cites many of the previous cases of this court, and, speaking for the court, says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation vs. McComb*, 92 U. S., 531, 541: "But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other."

"We think this principle applicable to this case, and that there was jurisdiction to issue the writ of mandamus" (pp. 261-262).

And in the same case it was further stated:

"there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action" (p. 262).

And in the case of *Ballenger, Secretary of the Interior, vs. U. S. ex rel. Frost* (216 U. S., 240, 249, 250) it was laid down:

"Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a Department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation" (p. 249).

And in the same case, having found that the rights of the relator to the lands in suits had become fixed and absolute, the court proceeded:

"Thereafter, the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered.

"That the performance of a ministerial duty can be compelled by mandamus, has been often adjudged" (citing cases, pp. 249, 250).

Finally, in the case of *Hoglund vs. Lane*, Secretary of the Interior, decided January 3, 1916 (44 App. D. C., 310, 314), the petitioner asserted that he was entitled to homestead patent for 160 acres of land, his right thereto having become absolute and fixed by the act of March 3, 1891 (26 Stat., 1095) (two years having elapsed from date of final entry without protest or contest pending), whereas the Secretary of the Interior not only denied his right to patent, but had actually undertaken to cancel petitioner's entry prior to the filing of suit, which was one in *mandamus*.

This court, having reached the conclusion that petitioner was legally entitled to receive patent for his entry, thus concluded its opinion in said case:

"The two-year period having elapsed, the law settled petitioner's title so far as the Land Department is concerned. Hence nothing remains to be done but the mere ministerial act of issuing a patent.

"The judgment is reversed, and the case is remanded, with instructions to issue the writ of mandamus, as prayed in the petition" (p. 314).

6.

THE RETURN MADE BY RESPONDENTS TO THE RULE TO SHOW CAUSE ISSUED HEREIN SET FORTH NO LEGALLY SUFFICIENT DEFENSE, AND THE DEMURRER THERETO WAS IMPROPERLY OVERRULED.

The principal grounds of defense presented by respondents in their return to the rule to show cause that issued upon the filing of the petition herein, as well as those urged at the hearing of the case below, have now been considered and discussed, with the exception of the following:

In said return it was stated that appellant company did not construct its road within the time required by the granting act, but was in default in respect thereof, and that as late as September, 1890, only about eighty-five per cent of its railroad had been constructed (R., 15), and in the argument below it was further stated that the portion of its projected but unconstructed road, namely, between Tres Pinos and Alcalde, never has been constructed, and was forfeited by the act of September 29, 1890 (26 Stat., 496); and, accordingly, it was contended that, being so in default, Congress was at liberty to declare a forfeiture or to annex conditions, and that the proviso inserted in the Sundry Civil Appropriation Act of August 30, 1890, *supra*, could be construed as an exercise by Congress of such right; citing, in alleged support of the proposition, the case of New Orleans Pacific Ry. Co. *vs.* United States (124 U. S., 124).

The contention so made is not only utterly lacking in merit but it is based upon a statement of facts that may be misleading, even if not so intended; and, in order that the real issue in the case may not be clouded and confused, it would seem proper to make brief reply thereto.

In the first place, the land-grant contained in the act of July 27, 1866, *supra*, required the railroad grantee to commence work on its projected road within two years from the

approval of the act; that not less than fifty miles of the railroad should be completed every year after the second year; the whole road to be completed by July 4, 1878 (sec. 8). The act further required the company to designate the line of its projected railroad by a plat thereof to be filed in the office of the Commissioner of the General Land Office (sec. 2).

On January 3, 1867, the Southern Pacific Railroad Company, in pursuance of the above requirement, filed in the Interior Department a map showing the location of the line of its projected road; according to which location the road was to extend from San Francisco southeasterwardly in the direction of Mojave, and thence eastwardly to a point on the eastern boundary of the State, on the Colorado River, a few miles below The Needles.

By act approved July 25, 1868 (15 Stat., 187), Congress *extended* the time for the construction and completion of said road; so that, instead of the times fixed, as above, said company was given until July 1, 1870, for the construction of the first thirty miles, and it was required to construct at least twenty miles every year thereafter; the whole line of road to be completed within the time fixed by the former act, *supra*.

Question having arisen as to the authority of the railroad company to make the location shown upon its map of 1867, *supra*, as it did not conform to the route provided for in its articles of incorporation, Congress passed a joint resolution, approved June 28, 1870 (16 Stat., 382), which expressly authorized the company to construct its road and receive patents along the designated route indicated by the above map.

As a matter of fact, the railroad aforesaid from San Jose to Tres Pinos, a distance of 50 miles, and from Huron to Mojave, a distance of 182 miles, was completed *within the time* required by the several acts aforesaid, and from Mojave to the Colorado River, a distance of 242.507 miles, it was completed subsequent to the required time, namely, in 1884; but not only was no advantage taken or point made, either

by Congress or by the Interior Department, in respect of said last-mentioned portion of the line, but the Secretary of the Interior formally *accepted* the construction and completion thereof. The history of the matter is fully recited in a decision rendered by the Secretary of the Interior, Bliss, in the case of Southern Pacific R. R. Co. (25 L. D., 223). See also Statement Showing Land Grants made by Congress, etc., 1915, on pp. 18 and 19 thereof, item 61.

Therefore the only part of the line of road of appellant company as originally projected which had not been constructed and completed at the time of the passage of the act of August 30, 1890, *supra*, and which never has been constructed, is a section between Tres Pinos and Alcalde; the construction of which latter, presumably for good and sufficient reasons, the company evidently decided to abandon.

By the construction of its railroad the company earned its land-grant as to lands lying opposite to and coterminous with the constructed portions of the line of road (within the designated limits), both granted and indemnity, and Congress has never, in any way, undertaken to declare any forfeiture in respect of said land-grant, or to impose any additional conditions thereon, except only as to the *unconstructed* portion of the line as originally projected, as below explained; and, of course, in the absence of legislative authority, the Secretary of the Interior would have no lawful right to impose conditions or restrictions upon the title intended to be conferred by the granting act, even if some portion of the railroad line was not constructed within the period prescribed. (See Wisconsin R. R., &c., Co., 5 L. D., 81, and Chicago, &c., Ry. Co., *id.*, 511.)

In connection with the land-grant legislation enacted by Congress in aid of the construction of various railroads it so happened that some of such roads *entirely* defaulted in construction, and some thereof *partially* defaulted; and thus it was that, in order to clear the public-land records and make one adjustment of the entire situation, Congress passed the

act of September 29, 1890, *supra*, which thus provided in *general terms*:

“That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all the lands heretofore granted to any State, or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted, and all such lands are declared to be a part of the public domain.”

The lands that are embraced in this proceeding are those lying opposite to and coterminous with the line of road (within the designated limits) *constructed* long prior to the above forfeiture act of September 29, 1890, just mentioned, as well, also, long prior to the Sundry Civil Act of August 30, 1890, *supra*, and as to which lands Congress clearly would have had no right to declare either a forfeiture or to impose additional conditions or burdens upon the title theretofore granted.

Again, the recitals in the patent here in suit absolutely refute said contention of respondents, the following appearing therein:

“*Whereas* it has been shown by evidence filed in the Department of the Interior that the entire line of the Southern Pacific (main line) Railroad and Telegraph from San Jose to The Needles, on the Colorado River, except that portion between Tres Pinos and Alcalde, which was declared forfeited by the act of September 29, 1890, has been constructed and fully completed and equipped in the manner prescribed by said act of July 27, 1866, and accepted,” etc.

In the face of the facts in relation to this matter, as well as the solemn and official recital contained in said patent, it would seem idle to assert a defense to this suit based on any such untenable as well as unfounded premise.

Finally, the case cited below by respondents in support of

their said contention, namely, that of New Orleans Pacific Ry. Co. *vs.* United States (*supra*), is here quite as inapplicable as is the contention itself. There Congress, by act approved March 3, 1871 (16 Stat., 579), granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, its successors and assigns, a land-grant to aid in the construction of a railroad between certain points; the land-grant being upon condition, however, that the company should complete the whole of said road within five years from the passage of the act. Beyond the mere matter of filing a map of *general route*, the grantee company did absolutely nothing under the terms of the grant, and the five-year period of limitation expired March 3, 1876. Thereafter, and on July 31, 1876 (19 Stat., 121), Congress passed a general law requiring all railroad grantees (except as to those specially exempted therefrom by law) to pay the costs of surveying, selecting and conveying lands granted to such companies. On January 5, 1881 (nearly *ten* years after the date of the above grant of March 3, 1871, and almost *five* years after its expiration), the New Orleans Pacific Ry. Co. purchased from the above grantee its interest in the above grant of public lands; and thereafter, with the approval of the Interior Department, it constructed the railroad, and was permitted to receive the granted lands. Upon demand made that it should pay the costs of survey, etc., as a condition to receiving patents for the lands granted, the company last named objected; but the Supreme Court held that said successor company was in no position to raise the question, since the railroad grantee had absolutely defaulted; that Congress had the right to impose the additional terms (*i. e.*, payment of costs of survey, etc.), and which it did by said act of 1876, and that the successor company accepted the conveyance from its grantor in 1881, with full knowledge of the provisions of said act of 1876.

The pertinency or applicability of the decision in the case just cited to the instant case is not apparent.

7.

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE CAUSE REMANDED, WITH DIRECTION TO ISSUE THE WRIT OF MANDAMUS, AS PRAYED IN THE PETITION.

The situation in this case is in no way complicated so far as the certain issued and outstanding patent No. 161 is concerned, the latter not having been recorded in any of the land districts or counties wherein the lands are situated or elsewhere, and it can readily be surrendered to respondents (tender in that behalf having been made in the petition herein, and here repeated and renewed), to the end that a new and substitute patent may issue to appellant company, from which shall be eliminated the certain clause hereinabove mentioned (R., 7).

Without further prolonging the discussion in the printed brief, it is respectfully submitted that appellant company is entitled to receive patent *confirming* to it the *full* and *absolute* right and title secured and intended to be secured under the land-grant aforesaid, and that the judgment below should be *reversed* and the cause remanded, with direction to issue the writ of *mandamus* against respondents, as prayed in the petition.

Respectfully submitted.

A. A. HOEHLING, JR.,
Attorney for Appellant.

HOEHLING, PEELLEE & OGILBY,
Of Counsel for Appellant.

WASHINGTON, D. C., October 4, 1916.

APPENDIX.

No. 1.

Subject: Reclamation Service.

M. B. DEPARTMENT OF THE INTERIOR, G. B. H.
UNITED STATES GEOLOGICAL SURVEY,
WASHINGTON, March 28, 1903.

Address only the "Director U. S. Geological Survey,
Washington, D. C."

The Honorable the Secretary of the Interior.

SIR: Under the terms of the act of August 30, 1890 (26 Stat., 391), it is provided that—

"In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

It is desired that the effect of this statute be considered in connection with the operations of the Reclamation Service. So far as the ordinary entries made under the public-land laws since August 30, 1890, are concerned, it is clear that they would be subject to a right of way for ditches or canals constructed by the authority of the United States, and it has been the practice of the General Land Office; I am informed, to insert such a proviso in the patents issued on entries of such dates.

Rights have vested to many tracts under other conditions, over which it will be necessary for the purpose of the Reclamation Service to obtain a right of way, and I have the honor to request the opinion of the Department whether in the cases specified or any other similar cases that

may be designated the act in question would have the effect of reserving the right of way for the construction of canals or ditches by the Reclamation Service.

First. In the case of land taken under the indemnity clause of railroad land-grants which has actually been selected subsequent to August 30, 1890. It is assumed that land within railroad granted limits would not be subject to such reservation, inasmuch as the granting acts are all prior in date to August 30, 1890.

Second. In the case of various school-land grants to the States or Territories where the land has been surveyed since August 30, 1890.

Third. In the case of indemnity school selections made subsequent to August 30, 1890.

Fourth. In the case of educational and other grants to the States and Territories where selections have been made subsequent to August 30, 1890.

Fifth. In the case of a special grant by act of Congress subsequent to August 30, 1890.

This appears to cover all the cases that might arise, but if others be developed in the course of the investigation, it is desired that they be included in the consideration of the Department.

Very respectfully,
(Sgd.)

H. C. RIZER,
Acting Director.

No. 2.

"F."
J. T. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, April 9, 1903.

Address only the Commissioner of the General Land Office.

The Honorable Secretary of the Interior.

SIR: I am in receipt, by reference from the Department, for report, of a letter from the acting Director of the Geological Survey calling attention to the following provision of the act of Congress approved August 30, 1890 (26 Stat., 391), viz:

"In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States,"

and asking whether said provision of law would have the effect of reserving the right of way for the construction of ditches and canals by the Reclamation Service in the following or any other similar cases.

"First. In the case of land taken under the indemnity clause of railroad land-grants which has actually been selected subsequent to August 30, 1890. It is assumed that land within railroad granted limits would not be subject to such reservation, inasmuch as the granting acts are all prior in date to August 30, 1890.

"Second. In the case of the various school-land grants to the States or Territories where the land has been surveyed since August 30, 1890.

"Third. In the case of indemnity school selections made subsequent to August 30, 1890.

"Fourth. In the case of educational and other grants to the States and Territories where selections have been made subsequent to August 30, 1890.

"Fifth. In the case of a special grant by act of Congress subsequent to August 30, 1890."

In response I have to report, that this office has never construed the act aforesaid as applicable to any of these cases, nor to other than entries under the public or general land laws, nor has the Department so construed it in so far as I am aware.

The letter of the acting Director of the Geological Survey and a duplicate of this report are enclosed herewith.

Very respectfully,
(Sgd.)

J. F. FIMPLE,
Acting Commissioner.

No. 3.

Instructions.

Reservation in Patent—Right of Way—Act of August 30, 1890.

“Secretary Hitchcock to the Director of the Geological Survey, June 4, 1903. (S. V. P.)

“By your letter of March 28th last you call attention to the act of August 30, 1890 (26 Stat., 391), wherein it is provided that—

“ ‘In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States,’

and request the opinion of the Department whether in certain cases stated or in similar cases the act in question would have the effect of reserving the right of way for the construction of canals or ditches by the Reclamation Service. Then follow five stated cases, wherein you inquire as to the effect of said act of 1890.

“I enclose herewith a report from the Commissioner of the General Land Office, dated April 9, 1903, stating that his office has never construed the act aforesaid as applicable to any cases other than entries under the public or general land laws.

“Since the passage of this act no occasion has arisen in the Department rendering it necessary to pass specifically upon the proposition as to whether the provisions of said act were intended to apply to cases other than those recognized in the practice of the General Land Office, as stated in the report above referred to; but upon due consideration of the question, having in view the peculiar language employed by said act, to wit: ‘In all patents for lands hereafter

taken up under any of the land laws of the United States or on entries or claims validated by this act,' and the recognized significance in the Land Department of the terms 'taken up under any of the land laws,' 'entries or claims,' as well as the character and class of claims validated by said act, I am constrained to believe that the General Land Office has placed the proper construction upon the provisions of this act, and you are so advised" (32 L. D., 147).

No 4.

Instructions.

Railroad Rights of Way—Reservation for Canals and Ditches in Patents.

"First Assistant Secretary Adams to the Commissioner of the General Land Office, April 19, 1912.

"Your letter of April 13, 1912, refers to recent order directing the insertion in approvals of rights of way granted under various easement acts of the reservation of a right of way through the lands for ditches and canals constructed by the authority of the United States, and asks instructions as to whether a similar reservation should be inserted in patents issued for lands granted to railroad companies, indemnity selections made by such companies, and selections made by the Northern Pacific Railway Company under the act of July 1, 1898 (30 Stat., 597).

"The act of August 30, 1890 (26 Stat., 391), requires—

"that in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States."

"In the case of grants of lands to railroad companies in what are commonly known as the granted or primary limits, the right of the railroad company thereto under the law attaches if the lands be subject to the grant at the date of the definite location of the railroad, and as to such lands, where

title vested prior to August 30, 1890, the reservation clause should not be inserted in patents issued.

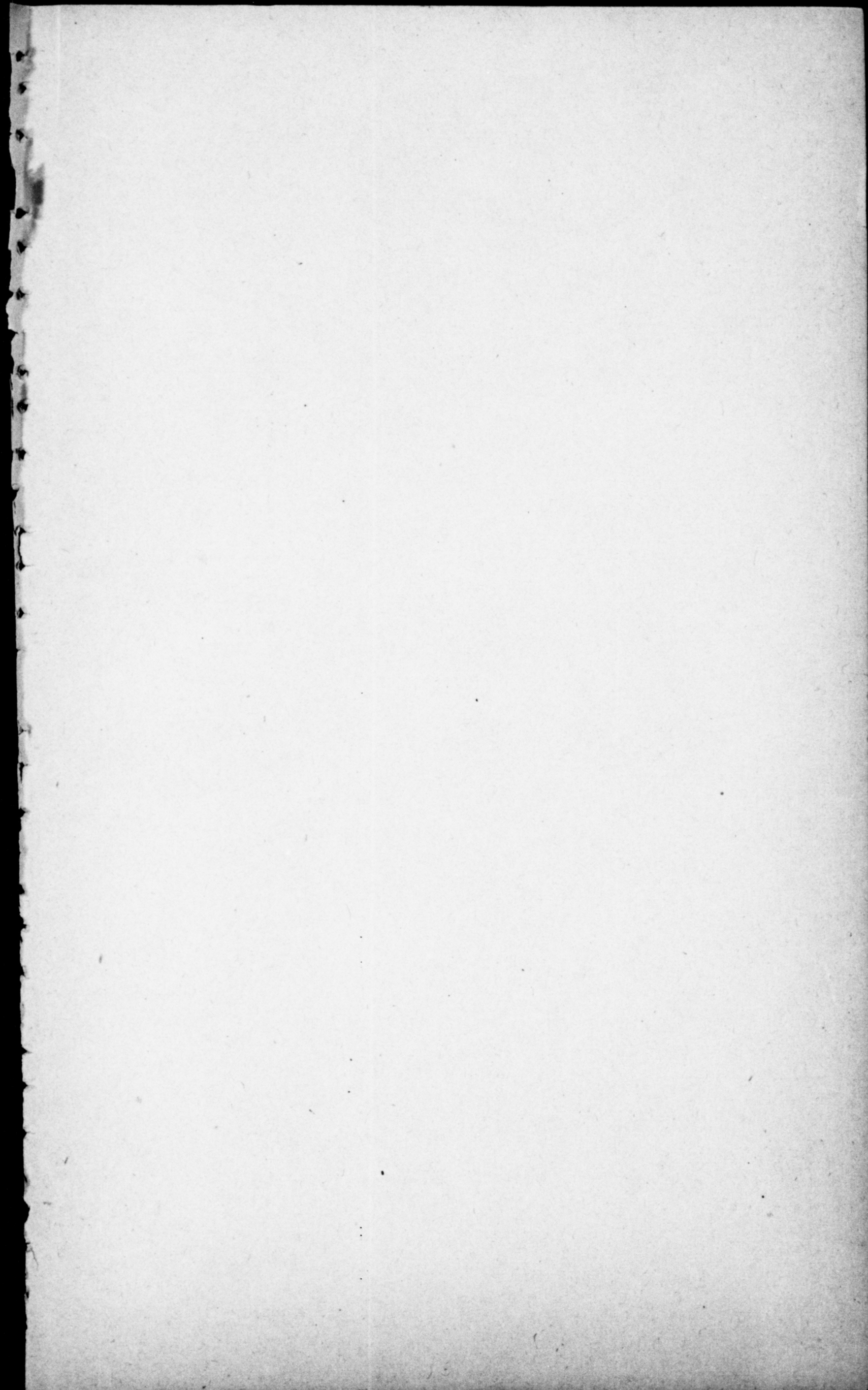
"As a rule, indemnity selections are required to be made upon designated sections within the limits defined by law, but selections can only be made after and upon the basis of a loss occurring within the primary limits. Until selection the lands remain subject to appropriation and disposition under the applicable laws and no vested right in or to the selected lands accrues until the approval of the selections.

"The act of July 1, 1898 (30 Stat., 597), which permits the Northern Pacific Railway Company to select non-mineral public lands in any State or Territory through which the road passes in lieu of lands within the granted or indemnity limits purchased from the United States or claimed in good faith by any qualified settler under color of title or claim of right under the public-land laws, requires a selection by the railroad company, and until the lands are so selected, same remain disposable under the public-land laws.

"If of the character subject to selection and the selection be regularly made and perfected as required by the law, patents are issued to the company, but its right, in so far as the selected lands are concerned, does not relate back to the date of the original grant of lands to the company or to the date of the definite location of the road.

"As in the case of indemnity selections, hereinbefore described, it has a right which, though based upon a grant made prior to August 30, 1890, is not initiated so far as the selected land is concerned, until the filing of selection. You are accordingly advised as follows:

"The reservation required to be inserted in patents for public lands west of the one hundredth meridian is not required to be inserted in patents issued for lands to which the grant or right of a railroad company attached prior to the date of the said act. It should be inserted in all patents for lands covered by indemnity selections made by railroad companies and in selections made by the Northern Pacific Railroad Company under the provisions of the act of July 1, 1898, *supra*, in all cases where such indemnity or other selections are approved subsequent to August 30, 1890" (42 L. D. 396-7).



**In the Court of Appeals of the District of
Columbia.**

HOUSE OF REPRESENTATIVES
DISTRICT OF COLUMBIA
FILED

OCTOBER TERM, 1916. OCT 23 1916

No. 3010.

Henry W. Hodges
Black

No. 13, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA EX RELATIONE
SOUTHERN PACIFIC RAILROAD COMPANY, A COR-
PORATION, APPELLANT,

v.

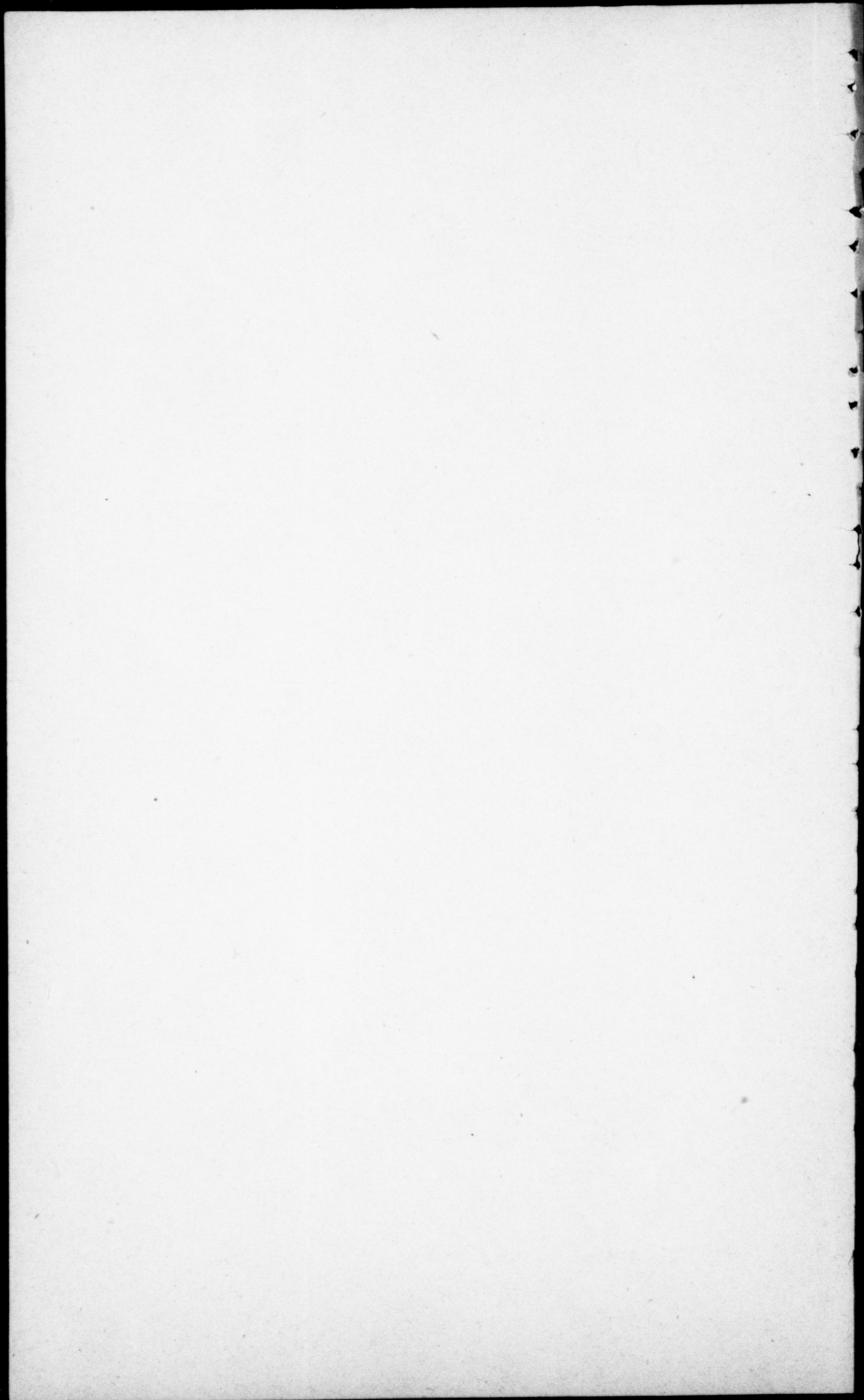
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR,
AND CLAY TALLMAN, COMMISSIONER OF THE GEN-
ERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLEES.

CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

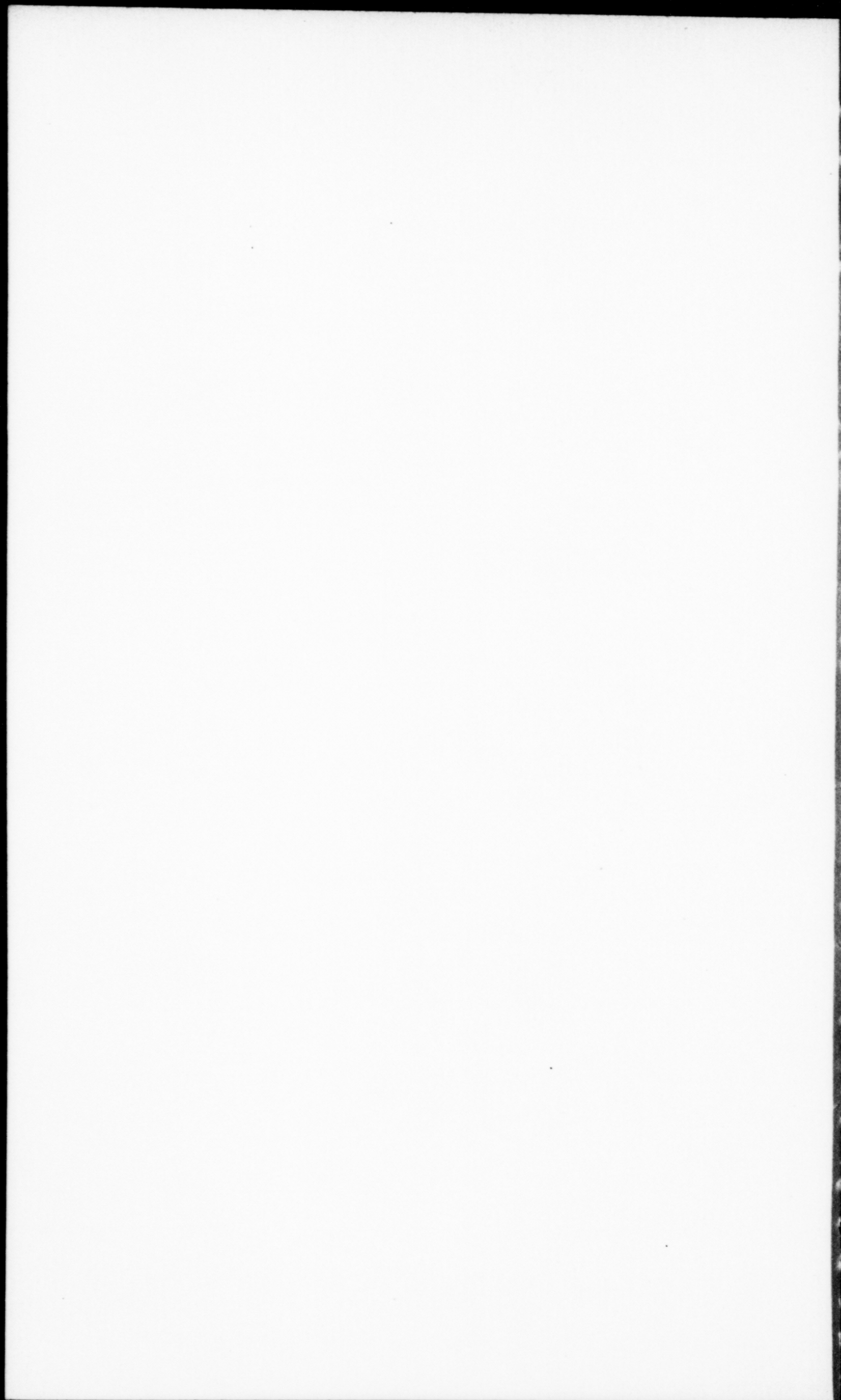


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In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1916.

No. 3010.

UNITED STATES EX REL. SOUTHERN
PACIFIC RAILROAD COMPANY,
APPELLANT,

v.

FRANKLIN K. LANE, SECRETARY OF
THE INTERIOR, ET AL.

No. 13, Special
Calendar.

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.*

BRIEF FOR APPELLEES.

The court below overruled appellant's demurrer to our answer and return and dismissed the application for a mandamus to compel the Secretary of the Interior to issue a new patent, duly expurgated in accordance with appellant's contention, in lieu of that already issued and delivered by the appellees to the company. It is from this judgment that the appeal lies.

STATEMENT OF THE CASE.

The appellant had a grant of land from the United States conditional on its building its railroad. The grant was of certain lands, to be defined by public survey, within the place limits along its right of way. These lands are not involved in this controversy.

But, as common to most grants of the kind, the appellant was also granted a power to select certain lands as indemnity for such lands in place as it might lose from varying causes. It is, and has been, the practice when a loss occurs that the railroad should designate (technically "select") some land within the secondary, or indemnity, limits of the road, which selection or list of selections ultimately reaches the department for approval or disapproval.

In the case at bar, the railroad filed its selection list embracing the land in controversy and the same was duly "clear-listed"—approved—and patent No. 161 (Exhibit A, Record, p. 9 *et seq.*) was issued, recorded, and delivered. But as the land was west of the one hundredth meridian, the patent contained a clause providing for the following reservation:

And there is reserved from the lands hereby granted a right of way for ditches or canals constructed by the authority of the United States.

This was inserted under the direction of a requirement contained in a proviso to be found in the act of August 30, 1890 (26 Stat. 391), which is as follows:

Provided, That in all patents for lands hereafter taken up under any of the land laws of

the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

It is to this reservation that the appellant takes exception and desires another patent, with the clause eliminated.

ARGUMENT.

Assuming at the outset that it is competent for a court to issue a mandamus for the purpose prayed and to compel the Secretary to issue a patent to lands no longer owned by the United States, the fee having certainly passed to the appellant February 10, 1915, whereby, ordinarily at least, the functions of the Secretary cease and determine as to the land (*U. S. ex rel. David Bowlegs v. The Secretary*, 43 App. D. C. 494), we defended the suit below on the proposition that even if the appellant's right in indemnity land is one sounding in contract, the railroad was in default at the time of the passage of the act of August 30, 1890, so that it was competent for Congress to annex further conditions; and on another proposition, to wit, that the grant as to indemnity lands is not a grant of land but a grant of a *power* in land; and, of course, taking either view, that the patent actually issued comports with the requirements of the law which the Secretary may not disregard.

POINTS.

1. The grant to the railroad, as to land within the designated indemnity belt, was not a grant of land *in præsenti*, but a grant of power in land, contingent upon the happening of future events.

2. The grant not being *in præsenti* did not prevent the United States from making any other disposition of the land; i. e., it could be homesteaded or otherwise disposed of *in toto*. Equally an easement might be attached to it.

3. Even if such right as Congress granted to the appellant is one sounding in contract, it was competent for Congress to annex further conditions by reason of appellant's default in carrying out the terms of the contract at any time pending the existence of such default.

4. The proviso in the act of August 30, 1890, applies to patents issued for railroad indemnity land situate west of the one-hundredth meridian.

I.

1. The grant to this railroad, as to lands within the designated indemnity belt, was not a grant of land *in præsenti*, but a grant of power in land, contingent upon the happening of future events.

II.

The grant not being *in præsenti* did not prevent the United States from making any other disposition of the land; i. e., it could be homesteaded or otherwise disposed of *in toto*. Equally an easement might be attached to it.

The *grant*, as to lands *in place*, was a grant *in præsenti*—"there be, and is hereby, granted," etc.

In the recent case, *United States v. Morrison et al.* (240 U. S. 192), Mr. Justice Hughes said:

It is insisted by the appellees that there was a grant *in presenti*, under which the State acquired a vested right in the lands subject only to identification which would relate back to the date of the grant, and that "any sale or disposal" subsequent to that date "was illegal and void." It will be observed, however, that the language used is not that of a present grant. The expression is "shall be granted," and these words are used both with respect to the described sections and to the undefined indemnity lands which would be received in compensation for losses. In the latter case there was obviously no present grant, and none, we think, was intended in the former. Attention is called to the words "herein granted" in the proviso of the enabling act, but this is a mere reference to what precedes and does not change or purport to change the terms of the donation. It must have been manifest to Congress, executing this definite policy with respect to the vast area of the public lands, that not improbably a long period would elapse in the case of numerous townships before surveys would be completed. Not only was it inevitable that upon survey there would be found to be fractional townships in which there would be either no section sixteen or thirty-six, or only a portion of one or the other, but in various instances there might be prior claims or actual settlements, or it might appear before surveys were had that there were important

public interests which, in the judgment of Congress, should be subserved by some other disposition of lands of a particular character.

As to the odd-numbered sections in place, only survey to identify was needed to effect passage of title. And patent when issued merely furnished *muniment of title*.

But as to indemnity lands, the situation is different. The act contains only a *grant of power*.

Southern Pacific R. R. Co. v. United States, 223 U. S. 565.

While, as just noted, the granting act as to lands in the place limits is "That there be, and hereby is, granted * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State," etc., the language as to indemnity land is:

and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands *shall be selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.

In the proviso the language is "may be selected." The grant of power is effective only on the contingency of loss in place.

The grant is for odd-numbered sections in place if only the land be nonmineral and be "public." It excepts lands granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of.

The grant of power (i. e., to select indemnity in the event of loss), is merely to take other lands "*under the direction of the Secretary*" in alternate odd-numbered sections within a certain distance beyond the place limits.

There is no guarantee about the land so to be taken. There is no guarantee that it will even be there, unappropriated, at the time the railroad may have occasion, if any, to select. And it can not be occupied land or land as to which anyone else has initiated any right.

It possibly might have been in the mind of Congress that the railroad would get as indemnity exactly, as to *kind*, *extent*, and *value*, what it lost in place. But the law does not say so. It merely gives *quantity* for *quantity*, so far as the same may be found in a designated section in the defined indemnity limits. It does not guarantee *quality*. If there be available lands within the secondary limits, and odd-numbered sections for odd-numbered sections lost, well and good. If not, the railroad loses, even as to *quantity*. The act does not say that if the road loses a very valuable odd-numbered section it shall be entitled to equally valu-

able land in the indemnity belt. It attempts no more than to give acre for acre—and it may be just such “a sorry trade” as Omar Khayyam sang of.

Moreover, the railroad gets nothing in the indemnity belt unless it asks for it. The grant is not, so to speak, self-executory upon identification, as is the grant of land in place. In *place*, the railroad takes title without any action of its own as soon as survey maps out the odd-numbered sections. But as *indemnity* it gets nothing without asking, for it is granted only a *power*. By *asking*, we mean selection. It gets nothing but an *inchoate right*. It asks that it may receive. But it can get, through the *disposing agent* of the Government, who is the appellee here, only what Congress authorizes him to give at the time *when he gives it*. If Congress has taken away that disposing ability by devoting the land to something else, the Secretary can not give it *at all*. Or if Congress has qualified the character of the land by imposing any restriction as to its use or any reservation of a right devoted to a public use, the Secretary, who is merely an agent, can give no more than his principal authorizes. So, at the threshold the question arises: Was the grant of indemnity such that Congress can not annex a further term, affix an easement, or limit in any way its scope?

With a certain qualification, that may be true as to the grant within the *place limits*. For that was a grant *in præsenti*. It contemplated existing present conditions only. It further contemplated that the *full consideration*, if you choose so to regard it, could

be paid out of the lands within the *primary limits*. Considerately it took cognizance of the possibility of loss, and so it supplemented the grant by another one—a *grant of power*.

As the court said in *Southern Pacific Ry. v. The United States, supra*:

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power.

All the described lands within the primary belt Congress granted outright in words of present tense. But it made no such grant of lands within the secondary belt, or even appropriated such exclusively to the use of the railroad. It was conceivable that *every acre* might be taken up by individuals before the road could ascertain a loss in place and make a lieu selection. And it was equally conceivable that the grantor might find for its own public and superior purposes another use for every tract. This appears in the purpose of the act of 1888, later to be noticed.

The power could be exercised only in the event that there was something at the time it was put in force on which it could operate. It must be an odd-numbered section. But that odd-numbered sec-

tion might then be under some restriction imposed by Congress. Perhaps the odd-numbered section might be devoted by Congress to some reserved use—for military purposes, for example—which might utterly destroy its availability for indemnification. And if Congress could destroy in effect, *in toto*, why could it not diminish in part, if public welfare so indicated? If, by the granting act, there was no such consecration to, or use by, the railroad as to prevent, say in 1869, dedication to some other purpose, why, prior to selection at least at a later date, could not Congress have reserved some right or easement in the land, whether it was to go to an individual under the homestead law, or to the railroad on indemnity selection as it might?

III.

Even if such right as Congress granted to the appellant is one sounding in contract, it was competent for Congress to annex further conditions by reason of appellant's default in carrying out the terms of the contract, at any time pending the existence of such default.

There can be no question that such power existed *even as to lands within the place limits*, if the railroad defaulted in any of the conditions of its grant.

And this road did. It did not complete the road within the contract time. The answer (Record, p. 15) so avers and the demurrer admits the charge. The road was heavily in default as late as September, 1890. Less than *half* the road was completed when under its contract 100 per cent should have been

completed. Only 85 per cent was completed in 1890. In that year a part of the grant was *wholly forfeited* by the act of September 29, 1890.

It is true that in *New Orleans Pacific R. R. Co. v. United States* (124 U. S. 125) the appellant was far more gravely in default than was the appellant in the instant case. But that does not affect the principle. If one is standing strictly on what he calls his contractual right, he must show that he, on his part, has strictly lived up to his obligations growing out of that contract. In the *New Orleans* case the road had not completed the whole of the road on the date it was under contract so to do. As a matter of fact, it had completed none. But the default, as far as the terms of the contract are concerned, existed because it had not completed the whole on a certain date; not because it had failed even to construct a part. The Supreme Court said (bottom of p. 127, *et seq.*):

Congress had a right at that time to impose upon the grant new conditions, the company having failed to complete the whole of the road by March 3, 1876.

So far, then, as its contractual rights are concerned, by reason of its failure to live up to its part of the contract it was competent at any time during the default for Congress to declare a default or to annex conditions. It did declare an absolute default and withdrew *in toto* its grant as to part of the lands, even those in the place limits.

IV.

The proviso to the act of August 30, 1890, applies to patents issued for railroad indemnity land situate west of the one hundredth meridian.

This, we think, is the real question in this case. Setting aside for the time being the question of a power in Congress to annex, by reason of any existing default, a further condition to a contract, assuming that the appellant's rights rest wholly upon a contractual obligation on the part of the United States, we contend that the very nature of such contract permitted the Congress to enact and apply the proviso in the act of August 30, 1890, to this railroad, and that it did so enact and apply that identical provision in all cases involving railroad indemnity land, the selection of which was approved after that date, if the same were situate west of the one hundredth meridian.

To understand the proviso in the act of August 30, 1890, we must go back to the act of October 2, 1888, which appears as a part of the sundry civil act. (25 Stat. 505, 526).

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all in-

struments, apparatus, and materials, and all other necessary expenses connected therewith, the works to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey under the supervision of the Secretary of the Interior shall make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals, for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation until further provided by law: *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead law.

Before the passage of this act the lands in question in this suit were part of the public domain. The railroad had initiated no right therein by *selection*. They were open to settlement—an act which undeniably would have defeated the appellant's right to select.

Under that act these indemnity lands might have been designated as sites for reservoirs and ditches or canals for irrigation purposes, and all lands which might have been made susceptible of irrigation thereby would have been "henceforth" reserved from sale and could not be subject to entry, settlement, or *occupation* until further provision of law was made. The only exception was that the President might, by proclamation, open any or all lands to settlement, *under the homestead laws only*, not under the timber and stone acts; not under the desert land law; not even under the act of Congress through which appellant claims.

It is no answer that these particular lands were not thus designated or reserved. It is enough that they could have been, either on the technical ground that, taking the appellant's right to be all that it is claimed to be, whatever *right* it had *sounding in contract*, had been forfeited by its default. Or, on the broader ground, on which we prefer to put it, that the railroad *had no vested rights in the land* that would prevent Congress from dedicating it to some other use or to affix thereto something in the nature of an easement for the benefit of the public.

The railroad had then merely an *unexercised power* to select the land under certain conditions and *upon certain contingencies*. Congress could do with it, without violating any contract with appellant, what it thought best to do in the interests of public welfare. Even against a settler (as distinguished from

an entryman) Congress could have reserved these lands for a public purpose.

Shepley v. Cowan, 91 U. S. 330.

And the settler's right would have defeated the railroad's indemnity right.

Of course, these lands were not designated for any purpose under the act of 1888. If they had been, the railroad would have lost *all* rights in the land, because they would not have been lands on which it was privileged to exercise its granted power, and at the time the *selection* of these lands came before the appellees for *approval*, it could not have obtained even the patent which it now complains about.

But in 1890—and the road was yet in default and had not as of contract earned its right to exercise its granted *power* as to these lands—Congress repealed the act of 1888 to the extent that it provided for withdrawals from entry, occupation, and settlement, *except* that it preserved reservoir sites theretofore located or selected under said act, and even reservoir sites *thereafter* to be located or selected. The act also provided that no person should enter public lands with a view to occupation, entry, or settlement, and acquire in the aggregate, under all of said laws, more than 320 acres. Then came the proviso. The pertinent text of the sundry civil act of August 30, 1890 (26 Stat. 371), will be found on page 391, and is as follows:

For topographic surveys in various portions of the United States, three hundred and

twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws; but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands here-

after taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

This act involved Congress in a lengthy debate concerning principally the repeal of portions of the act of 1888 authorizing such wholesale reservation from appropriation. The proviso came in, we believe, by Senate amendment or in conference just before the passage of the bill. Little is said of it. One of the conferees, Mr. Sayers, did mention it in report on the result of the conference as follows:

In the issuance of *all* patents by the Government of the United States to *any person whomsoever*, under the operation of this law there should be reserved in the *arid* land district the right of easement over lands embraced in the patents for irrigating ditches for public use.

That was his explanation of its presence in this bill.

The purpose of the act of 1888 was to better conditions by making *undesirable* land *desirable*; i. e., by irrigation, a scheme that found its final expression in the reclamation law and system.

The act of 1890 was not an abandonment of purpose but a *relaxation* in method. It permitted private acquisition of public lands, but under conditions that would conserve the public welfare without

putting an extra burden upon the public, if, in the working out of plans by Congress, it might become necessary to construct ditches and canals in aid of its purpose. It merely reserved rights of way. The Government had the entire estate in these lands, but it was willing that such estate should pass to an individual as heretofore, with simply a *reservation* for possible ditches and canals.

The thought might now appropriately be suggested that the *reservation* in the patent confers a benefit rather than a burden by way of restricting a right. Obviously, the United States is not going to run ditches and canals except where natural arid conditions require them in order to make the land better, more fruitful, more productive, more responsive to culture, and more valuable.

As a practical proposition, it is not conceivable that the Government is going to spend money where it is not needed. It is only as to lands, vast tracts of land, that are valuable only when irrigated, that there will be occasion to construct ditches and canals. Potentially, Congress may construct ditches and canals where it pleases in respect of lands it may pass by patent out of the United States west of the one hundredth meridian without condemnation proceedings to secure a right of way or compensation to its grantee. Practically, it is not conceivable that Congress will construct any such canal or ditch, except where physical conditions require—where the *benefit* would undoubtedly more than offset the *damage*.

Where you find such conditions, why should Congress distinguish between lands acquired in private ownership out of that part of the public domain requiring improvement? Why reserve such a right of way over an *even-numbered section* and at the same time part with title, without that reservation, to an adjacent *odd-numbered section*? If it be an easement in the nature of a *burden*, why affix it to land which may be acquired under the homestead law, and *withhold* it from land possibly upon selection to pass to a railroad and thence to a railroad's grantee, and then, if there be need of a ditch or canal, pay such a grantee for the privilege of passing across his land?

Congress did not mean to give anything more to a railroad within its indemnity limits than it gave to the homesteader. Both claims emanate from *grants of power* in a broad sense: To the homesteader to acquire the land under certain conditions; to the railroad to acquire the land upon certain contingencies and in a certain way.

The language of the act of 1890 is the broadest that can be used, because the purpose of the law was broad. It did not attempt to foist an easement upon land already acquired, *although even as to land to which definite rights had attached, such as entries or claims validated by the act itself*, it provided that the reservation should be inserted in the patent.

For instance, if the railroad had a selection suspended for some reason, growing out of the act of 1888—some claim initiated by selection—and the suspension was released by this act of 1890 so that it

became a "validated" claim: Even then the reservation would have to be inserted in the patent.

The act did not attempt to go back and tie the condition to a grant already made—the grant *in præsentia*, to the railroad of lands within its place limits, for instance. But when it spoke of "land laws," it used that term in the broadest sense as one that would embrace *any form or method of acquisition*—homestead, timber and stone, desert land, scrip, coal land, mineral, or *any form of grant requiring administration through the Land Department in its initiation and perfection*.

The act of 1890 speaks not of *public* land laws. If such a qualifying adjective as "public" had been used, there would have been more reasonable grounds for appellant's contention. That is, counsel might have argued that the phrase "public" land laws refers to laws generally available to the qualified public, such as the homestead law; whereas a railroad indemnity grant is in the nature of a "private" land law because the named beneficiary, not the general "public," may avail himself of it. No member of the "public" can institute a claim to land under any act of Congress providing for a railroad indemnity selection; the named railroad alone can do that. Yet the grant of power to the railroad is a law of the land. It is a "land" law because it provides a special means, for a special purpose, whereby a special beneficiary in the special way and on the special occasion named may proceed to acquire title to the land. It is of significance, then, that the language of the act

of 1890 is all embrative. The act refers to "patents for lands hereafter taken up under *any* of the *land laws* of the United States"—not *public* land laws, but "*any* of the land laws." "Taken up" implies an action that sets in motion some law whereby the party expects to acquire title—some law with the provisions of which, including the granting conditions, he must show that he has complied; and he must make that showing before the only disposing agency of the Government that the law has provided—the Land Department.

There is nothing in the nature of a railroad indemnity grant that *distinguishes* it from the *purpose* of the legislation of 1890. There is nothing in the nature of making definite and effecting that grant, in respect of a particular tract of land, that *distinguishes* it, except in method, from the grant of power by a *qualified* citizen to take that tract under this, that, or the other way provided in the *land laws*. Every land law "contemplates the uncertain and looks to the future," as the court said in the *Southern Pacific* case. We do not know what land will be taken up, by whom it will be taken up, or under what law it will be taken up. Congress grants a power in general terms which a *qualified* citizen, meeting the conditions, may exercise in the acquiring of public land. It also gives to the railroad a *power* which it may exercise for the same purpose upon certain conditions and upon certain contingencies.

To get anywhere and to anything, the railroad and the entryman must, in the way provided by the "land laws," under which either is proceeding, invoke the operation of that law in the land department—the disposing agency of the Government. The entryman does it one way; the railroad in only one way, by a selection to be approved by the Secretary.

The entryman himself may be applying for the land under *indemnity scrip* right to secure land in lieu of some lost by him in place. It will not be contended that the reservation *does not apply to his case*. Or he may be an ordinary homestead entryman. It makes no difference. Each—the man or the railroad—is seeking to acquire the land according to some Federal law, and to convert public land into private ownership.

Our position is that the Secretary is not left by this act of 1890 to be a respecter of persons. In each and every patent that issues through him for any land west of the one-hundredth meridian (save, of course, where the patent is, after all, only a muniment of a title already vested), he must insert the reservation. If it is not a good reservation—that is, if it does not in law create the easement it purports—no harm is done. If the land taken is not in such a location where such ditches and canals are needed in the nature of such things, the easement is as innocuous as a reservation of a right of way above for the passage of an aeroplane. And if it is in a locality where such things are needed, the only thing the

owner of the land will have occasion to regret is the loss of an opportunity to extract money from the Government for an act benefiting his own land.

And now concretely, getting down to this particular case: Counsel for the appellant conceded below that if, at the time of selection, the railroad found a ditch on the land, it must take it as it was, ditch and all. He does not claim that that would violate its contractual rights. He admits that it would not. What conceivable difference is there between his taking the land with a ditch *in esse* and his taking the land with a *potential* ditch, so to speak—a ditch that may or may not later come into existence? His answer to a question addressed by the court below was that he was entitled to take the land in the *condition* it was at the time of selection. All right. But again, and so far as the contract is concerned, what difference does it make whether the *condition* then existing is a tract of land with a ditch actually there, or a tract of land on which the right to dig a ditch in the future possibly may exist? One is a present fact; the other a future possibility. But both go to the *condition* of the land. If the appellant may not complain of the *fact*, that is, must take the land, ditch, and all, why may it complain of a mere possible ditch that may never in fact be dug? We could ditch all the land before selection and the railroad would be obliged to take it in that condition, and that existing condition would not violate its contract according to appellant's own contention. But it is a violation of the contract to be required to take it with the right reserved to dig those selfsame undug ditches!

THE APPELLANT'S BRIEF.

Much attention is given by the appellant to the fact that not until 1912 was it considered that the reservation of rights of way applied to railroad indemnity selections as well as to public land law entries. It appears from the exhibits in its brief that the head of the department was never called upon to construe the act until 1903, when the view then taken was unlike the one now prevailing. But surely counsel has heard of such a thing as a court overruling one of its former decisions. Even the Supreme Court only last spring in the case of *U. S. v. Nice* (241 U. S. —) overruled a decision rendered a few years ago (*In re Heff*, 197 U. S. 488)—a decision many times used as the basic authority for deciding other cases. The Land Department as a quasi-judicial body is called upon to construe the statutes it administers. It is a new doctrine that its first construction is immutable and that it binds forever the successors of the Secretary rendering it. The authorities on which the learned counsel for the appellant depends do not mean that a tribunal may not change its own construction of a statute long obtaining. They merely support the proposition, as we understand it, that where a statute is susceptible of more than one construction, its contemporaneous construction by the tribunal appointed to administer it, long continued, is not lightly to be disregarded by some court when it may have occasion to interpret the statute. That is, if as an original proposition a court might have in-

clined to a view other than that taken by the administrative tribunal, yet the court will not ordinarily disturb the construction long obtaining.

The Secretary has imposed upon him the duty of issuing these patents. Congress is constantly passing laws that need consideration and require determination as to whether they affect this or that situation. Here is the act of 1890 with language that may be ambiguous. Appellant says that a proper construction excludes railroads from its purview. Counsel points to the fact that such was the view prevailing in the department for 21 years. On the other hand, since 1912, another view has prevailed—the view that “land laws” includes private-land legislation as well as general statutes. This was the view of the learned justice who decided the case below. No one can say that either view is unreasonable or impossible. One view is right, of course, and the other view is wrong. Is it for this court in a mandamus proceeding to review the Secretary and to say that his view is wrong? Have we not here exactly the situation in *U. S. ex rel. Ness v. Fisher* (223 U. S. 683) and in *Riverside Oil Co. v. Hitchcock* (190 U. S. 316)?

And finally in this connection: The patent *excepts* nothing out of the so-called grant. The patent already issued has passed the fee. It contains a *reservation* of an easement—not an *exception* excluding some part of the land. Now, if the appellant is correct, if the act of 1890 does not apply to indemnity selections, if it could not legally be imposed even by Congress itself, then we say the appellant

already has the full title under its patent, for the attempted reservation would in that event be wholly void. This, we understand, is the attitude of other railroads in whose patents the department is inserting this reservation, their position being that if the reservation belongs in the patent they may not complain, and if it does not, is merely a vain and idle pretension, then they need not complain.

CONCLUSION.

Finally, we submit that the appellant is not a party to any contract of which the reservation is violative.

We submit that even if it were otherwise it failed to carry out its part of the contract and may not complain.

We submit that "under any of the land laws" embraces all laws that may be invoked generally or specially by anyone seeking to acquire a part of the public domain.

We submit that the appellees have no choice in the matter; that they are bound to insert the clause in all deeds, leaving the legality of the reservation to be tried out in appropriate proceedings when the reservation is sought to be made effective.

We submit that if the railroads are in a class apart by themselves, so that reservation does not refer to them, that the appellant is not damaged.

We submit that the Secretary has already issued a deed to the appellant for the lands selected by it and has discharged his full duty in the premises.

We submit that it is such a deed as, exercising his discretion, he felt he had authority under the law, as the disposing agent of the Government, to issue, and that he ought not to be reviewed by the court, and the court's view, if different, foisted on him. He should not be compelled by mandamus to discard his own judgment and by force to take that of another. A writ of mandamus may go only where a duty unperformed is perfectly clear and *unmistakable*; and this at any rate is not that kind of a case.

And in conclusion, the writ invoked is an extraordinary remedy and should not be employed where an ordinary remedy exists; in other words, if the reservation is beyond the authority of the Secretary to make, its legality can be tested in the ordinary way when it is undertaken to enforce it.

The judgment below should be affirmed.

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